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IN THE

Supreme Court of the United [illegible]

October Term, 1965
No. 368

A book named "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS (Intervenor),

Appellant,

vs.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellee.

On Appeal From the Supreme Judicial Court of Massachusetts.

Motion for Leave to File and Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

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vs.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellee.

On Appeal From the Supreme Judicial Court of Massachusetts.

Motion for Leave to File a Brief for Citizens for Decent Literature, Inc., an Ohio Corporation, as Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation respectfully moves for leave to file a brief as *amicus curiae* in support of the Appellee in this case. The consent of the Attorney General of the Commonwealth of Massachusetts has been obtained, and has been filed with this court. The consent of Charles Rembar, for G. P. Putnam's Sons (Intervenor), was requested by letter dated November 13, 1965, but no response to this request has been received.

Probable jurisdiction was noted on November 8, 1965, at which time the case was placed on the summary calendar for argument with Ralph Ginzburg *et al.* v. United States, October Term, 1965, No. 42 and Edward Mishkin v. State of New York, October Term, 1965. No. 49 during the second week in December. The acceleration in the hearing of this matter made a more timely filing impossible.

The interest of Citizens for Decent Literature Inc. is more fully set forth in the accompanying brief.

Respectfully submitted,

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On Appeal From the Supreme Judicial Court of Massachusetts.

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature. by cooperating with law en-

forcement in the enforcement of the laws. For the Court's convenience *amicus curiae* is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the courtroom advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity," through legal advocacy in the courtroom in support of the people's case.

A Book Named "John Cleland's Memoirs of a Woman of Pleasure", G. P. Putnam's Sons (Intervenor) vs. Attorney General of the Commonwealth of Massachusetts is a case of nationwide importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation.

Statement of the Case.

On February 10, 1964, Edward W. Brooke, Attorney General of the State of Massachusetts, filed a petition in the Superior Court of Suffolk County under the provisions of Section 28 C of Chapter 272* of the General Laws of Massachusetts alleging that there was probable cause to believe that an obscene paperback book named "John Cleland's Memoirs of a Woman of Pleasure" (commonly known as Fanny Hill) was being imported, sold, etc., in the Commonwealth. The petition further alleged that the publisher** and copyright holder was G. P. Putnam's Sons of the City of New York.

On the same date, Justice Eugene A. Hudson of the Superior Court filed a statement indicating that, after reading and studying its entire contents, he was of the opinion that there was reasonable cause to believe the

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*Section 28 C-H were enacted into law as part of Chapter 272 in 1945 as an ancillary proceeding to Section 28B thereof which provides a criminal penalty of up to five years in the state prison or not more than two and one-half years in the House of Correction and/or a fine of not less than $100 nor more than $5,000 for dealing in obscenity. Section 28D provides in part that "Any person interested . . . may claim a right to trial by jury on the issue whether said book is obscene . . ." Section 28F provides in part "At such hearing the court may receive the testimony of experts and may receive evidence as to the literary, cultural or educational character of said book and as to the manner and form of its publication, advertisement, and distribution. . . ."

**The publishers of Fanny Hill are legion. Until the recent decisions of this Court the overwhelming majority preferred to remain anonymous. Some (but not all) of the modern competitors of G. P. Putnam & Son are: Brandon House (P. 901), owned by Milton Luros, 7311 Fulton St., Los Angeles, California, also a publisher of girlie magazines, nudist magazines and sex (predominantly Lesbian type) paperbacks; All Star (AS 10) owned by Edwin A. Schnepf, of 10539 Burbank Blvd., Los Angeles, California, also a publisher of girlie magazines, nudist magazines and sex tabloids and sex paperback books, and Fitz Publishing Company, Los Angeles, California, distributed nationally by Golden State News (GSN), owned by a publisher and distributor of girlie magazines, nudist magazines, and sex paperback books.

book to be obscene. He entered an interlocutory finding and adjudication to that effect and ordered publication of a notice to show cause why such book should not be judicially declared to be obscene, and transmission of the same by registered mail to the publisher and copyright holder in New York City.

On the return date, March 19, 1964, G. P. Putnam's Sons filed an answer to the petition, as an intervenor, admitting it was the publisher and copyright holder, the sale and distribution in the Commonwealth, but denying that the book was obscene and alleging affirmatively that the same was protected by the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment.

Neither party "claimed" a jury as authorized by Section 28 D.

On April 16, 1964, an order was entered setting the matter for hearing on May 27, 1964, without jury. The case was tried before Superior Court Justice Donald M. Macaulay, on May 27, 1964.

During its case in chief, a copy of the paperback book "Fanny Hill, John Cleland's Memoirs of a Woman of Pleasure" was introduced by stipulation. The Attorney General called one literary person as a witness, Dr. John E. Collins, Headmaster of the Newman Preparatory School.

During its case in chief, intervenor introduced documentary evidence in the form of book reviews, essays and newspaper and magazine articles. The publisher's President Mr. Minton, and five persons in the literary field testified as witnesses: Fred Holly Stocking, Professor of English and Chairman of English Department,

Williams College, John N. Bullitt, Professor of English and Master of Quincy House, Harvard College, Robert H. Sproat, Associate Professor of English Literature, Boston College, Norman N. Holland, Associate Professor of English, Massachusetts, Institute of Technology and Ira Konigsberg, Assistant Professor of English and American Literature, Brandeis University.

Attorney General of the Commonwealth of Massachusetts—Case in Chief.

A copy of G. P. Putnam's Son's paperback book entitled "Fanny Hill, John Cleland's Memoirs of a Woman of Pleasure" was admitted into evidence as Exhibit A.

John E. Collins, the headmaster of Newman Preparatory School, testified to his educational background and experience. He received a Bachelor of Arts degree from Boston College in 1925, a Master of Arts degree from Boston University in 1926, and a Doctor of Philosophy degree from Boston College in 1936. He did graduate work at Harvard and Oxford. He taught at Boston Latin School for 22 years, was head of the English Department at the State College at Boston for 16 years and Academic Dean and Dean of the Graduate School until February 1, 1964, when he became headmaster of Newman Preparatory School. His area was English literature. He had lectured and had prepared and contributed articles [R. 10].

Dr. Collins testified that he had read Fanny Hill and that in his opinion the book was "obscene" and "indecent" [R. 11]. In his subjective opinion the book "unconditionally" would arouse prurient interest in a reader [R. 13]. The book "lacks literary merit" [R. 13] and, judging the book from the point of view of a

human document, he could not "find that it had any social significance nor any literary style that might lift it up beyond pornography" [R. 13]. In his opinion the book was "pornographic" [R. 14], "hard-core pornography", "offensive" [R. 14] and "patently offensive" [R. 15].

On cross-examination by the intervenor's attorney, Mr. Rembar, Dr. Collins stated that he was familiar with the English novels of the 18th Century and taught courses on the English novel, comparative study of the novel, contemporary novel, Shakespeare, a course in biography and others [R. 16]. He understood the word "prurient" to mean "dirty", "sexual", "erotic" and "for the purpose of stimulating sexual reactions" [R. 16]. Zola's "Nana" was an example of a book that he would regard as "predominantly erotic" but which he would not regard as "predominantly prurient" because it had literary merit which "lifts it up above and beyond the word 'prurient' " and was a "human document" [R. 17]. He understood the word "obscene" to mean "disgusting" as confined to books that deal with sexual subject matter [R. 18]. He understood the word "indecent" to mean "contrary to public mores, to the customs of the people and the common standards of a given time and a given place" [R. 19]. In reference to the phrase "patently offensive" he understood "patently" to mean "openly" [R. 19]. In his opinion Tropic of Cancer was patently offensive, indecent, appealed to prurient interest and was obscene [R. 19].

The court sustained an objection to the question of intervenor's attorney whether Dr. Collins agreed with a certain book review in the New York Sunday Times Book Review Section. The court ruled that such was

hearsay and, if admitted, would let into evidence the opinion of another witness not under oath [R. 22].

Intervenor's attorney made an offer of proof on four exhibits: Exhibit 1, a review of "Speaking of Books" by J. Donald Adams in the New York Times Book Review, dated July 28, 1963; Exhibit 2, an article entitled "The Harlot's Progress" by V. S. Pritchett, contained in the October 31, 1963 edition of the New York Review of Books; Exhibit 3, an article entitled "Mersey Sound, 1750" by Brigid Brophy, from the November 15, 1963 edition of "New Statemen"; and Exhibit 4, an item bearing the subheading "Taste" under the heading "Modern Living" from the August 2, 1963 edition of Time Magazine. The offers of proof were excluded on the grounds that such exhibits were inadmissible as hearsay, being opinions of persons not in court for cross-examination [R. 22-40].

The Attorney General of the Commonwealth of Massachusetts rested his case [R. 40].

G. P. Putnam's Sons (Intervenor)—Case in Chief.

Fred Holly Stocking, Professor of English and Chairman of the English Department, Williams College, Williamstown, Mass., testified to his educational background and experience. He had been teaching English since 1937 and had taught a wide range of English literature from Chaucer to the 1930's [R. 41-42].

Mr. Stocking testified that he was familiar with the book in issue and that in his opinion it had literary merit because it "is a work of art. That is to say, I think it asks for and receives a literary response as distinct from a non-literary response." [R. 42]. It was "an act of contemplation presented through a story that is

presented in an orderly and organized fashion, with a fictional central character, and with a literary style that is definable and commendable. I think the central character is presented as a person who, at the time of writing these words, is essentially what I call an intellectual. By an intellectual, I mean someone who is extremely curious about life and who seeks with objectivity and detachment to record with accuracy the details of the external world, physical sensations, psychological responses . . ." [R. 42]. In his opinion, the character was essentially "an empiricist who does arrive at certain conclusions, certain conclusions about moral values, certain conclusions about the nature and high value of temperance, certain conclusions about the value of the life of the mind, who arrives at a clear intellectual distinction between the nature of love and the nature of lust." [R. 43].

Mr. Stocking testified that the "intellectuality of this character" was made clear to him by the prose style, which "is ceremonious, formal, consciously formed, and in a way that I find pleasurable and highly artificial. This establishes the air of detachment from the beginning." In his opinion it was "extraordinary" that a man could project himself into the mind of a woman "in as precise and vivid a way" as Cleland had [R. 43].

In Mr. Stocking's opinion, the book was a structured novel which "offers that kind of vicarious experience and the conclusions one can derive from vicarious experience which one cannot derive from one's own experience. . . ." [R. 43].

It told him things about human nature and the 18th Century that he might not otherwise have known [R. 43].

On cross-examination by the Assistant Attorney General, Mr. Sullivan, Mr. Stocking testified that he got his BA from Williams College and his MA and Ph.D in English from the University of Michigan. He had been at Williams since 1940 as a member of the faculty [R. 44]. Mr. Stocking said that he understood "there is a passage that the editors believed a later publisher inserted and therefore was not written by Cleland, but does occur in some 18th Century editions of this book." [R. 47]. The passage referred to the homosexual episode.

On cross-examination Mr. Stocking testified that in his opinion the description of the depravities, such as homosexuality and lesbianism were "not obscene because they are subordinate to an interest which is primarily literary, whereas an obscene piece of literature has an interest which is primarily to arouse sexual passion in the reader." Individual passages in the book "do of course" give rise to sexual passions in the reader [R. 49]. Asked percentage-wise "what proportion of this book is devoted to depicting sexual relations of one kind or another" he answered, "My guess would be less than half" [R. 51]. Asked if the depicting of these sexual relations, intercourse, homosexuality, lesbianism, or depravity, as presented in the book, aroused prurient interest in the reader, he said "The answer is no. That is not the chief—"; later, that he could not "give a Yes or No because it arouses many interests, of which a prurient is—"; later, that he could not give a Yes or No answer [R. 51-52].

On re-direct examination by intervenor's attorney he testified that his impression of the book as a whole was that "It is essentially trying to be, and is successful in

being, a literary work, that is to say, a piece of writing that intends to and succeeds in evoking a literary response." [R. 53].

John M. Bullitt, Professor of English at Harvard and Master of Quincy House, testified to his experience. The 18th Century was his specialty in the field of English [R. 53].

Mr. Bullitt testified that he had read the book in issue and was of the opinion that it had "detectable literary merit and considerable historical value" [R. 53]. Though not "a great work of art by any means" it was "recognizable as an effort to interpret a rather complex character living in a world peopled by highly diversified characters, going through a number of very different situations. There is evidence, it seems to me, here of a rather skillful, not greatly skillful, but rather skillful effort to construct a recognizable plot with a purpose behind it." [R. 54].

Mr. Bullitt testified that the book "has a good deal of interest as it relates to a number of other books in the 18th Century which are concerned with some of the same themes, some of the same points of view." like Henry Fielding's Joseph Andrews and Richardson's Clarissa and Pamela. The moral structure of the theme Cleland resolves "in a way which is customary among his contemporaries in the 1740's, namely, although she asserts very strongly throughout the novel the value, the importance, of sexual pleasure, she at the same time learns, and the sense of the novel can be construed as the education of a young woman in a moral life, the value of love" [R. 55]. "Here she asserts during those last pages at some length the whole idea that a

sensual passion is only truly experienced when it is associated with the emotion of love. . . ." [R. 55].

Mr. Bullitt was of the opinion that there was a good deal of deliberate, calculated comedy in the novel "For example, the metaphoric structure which Fanny uses when she describes her seduction, if I may use that word, by the sailor, is nautical." [R. 55]. The deliberate, calculated use of the metaphore is amusing [R. 56].

Mr. Bullitt testified that a "second aspect of the book" "that might bear emphasis is the way in which Cleland follows a tradition of descriptive characterization. It may not be an accident that she takes the name "Fanny". It may be that Cleland clearly had the adventures of Joseph Andrews, by Henry Fielding, in mind." [R. 56]. He cited the characterizations of Ester Davis, who brought Fanny to London, "about 46 years old, tall, meager, red haired, with one of those trivial, ordinary faces you meet with everywhere and go about unheeded, unmentioned . . ." and Phoebe, the prostitute, who is "red faced, fat and in her early 50's, who waddles into a room" as instances of the treatment and development of character that is typical of the novel as a literary form. They are "very careful, exuberantly done charterizations" "There is a rather careful effort here to delineate this person." "This kind of writing is very skillfully done. It is a mark of an artist" [R. 57].

On cross-examination by the Assistant Attorney General, Mr. Bullitt stated that there was considerable sensual delight in the book, and that there were phrases which depicted depraved sexual relations [R. 58]. He admitted that "So far as I can recall, every character in the book has, at some time or other, some relation

to sexual activity" [R. 59]. Asked concerning the purpose behind the novel which he referred to on direct examination, he replied that one purpose of the book is "to write a novel that is going to be of interest to his readers. That is perfectly clear. Beyond that, he does have an idea to present—a purpose in that sense. He is communicating." [R. 59].

Asked if he believed if the average reader in the community to whom the book would become available would have aroused in him or her prurient interest, he answered "Your Honor, do I have to answer that yes or no when I find it very difficult? I am no sociologist, your Honor; I am a professor of English. . . . I am not a sexologist; I am not a professional in this matter." [R. 61]; later, "I think it is possible, but I find it incapable, honestly, to be certain." [R. 62]. Asked "Is the book obscene in your opinion" he replied, "I have no opinion on obscenity". Asked if he had an opinion on offensiveness, he replied "yes" and that he felt it was not offensive [R. 62].

On re-direct examination by intervenor's attorney, Mr. Bullitt was asked the reaction of the reader to the homosexual description in Fanny. He replied that in his opinion the readers "are somewhat influenced by Fanny's own response. Fanny's response is disgust, horror, indignation. She explains very carefully that the only reason she sees the scene to its conclusion is not for any pleasure that she receives in voyeurism, but rather so that she can document the facts so that she can go and get help and to have the people arrested. This is the reason why she hurries so rapidly, catches her foot on a nail, falls, is knocked unconscious; they hear her and they escape." [R. 62-63].

On re-cross-examination by the Assistant Attorney General, he was asked if he would use this type of language over the breakfast table with his wife and he replied, "Yes, indeed, indeed.", and "There isn't a single dirty word in this book." [R. 63].

Robert H. Sproat, Associate Professor of English literature, Boston University, testified to his experience. He had been a member of the faculty at Boston University for approximately 17 years [R. 63].

Mr. Sproat testified that he had read the book which was before the court. In his opinion the book had very definite literary merit and as such had social value. It was a work of art, having an interesting structure "fundamentally in three parts. It bears upon the development of the character of the heroine." "The first part, up to her meeting with Charles; the second with her experience with, I think it is Mr. H; and then, finally her salvation in love with Charles. I think each of these sections is intricately or organically related to the character of Fanny, to help develop the heroine's final moral and philosophical values. Now, they aren't very great, I will admit that—they are not profound, but they are legitimate values, and they are positive values." Asked "What are those values?" He replied, "I think that, at the risk of oversimplification, she finds that love, that sex without love, with love, is a good thing." . . . "Cleland is dealing with the opposition in the novel between sex without love and sex with love." In his opinion the character of Fanny belonged to the minor classic heroines, falling between James Joyce's Molly and Moll Flanders [R. 64].

Mr. Sproat testified that one aspect he found interesting about the work was "the language functions

in his novel to create a distance, even when the sexual experiences are portrayed, and, I will admit, they are portrayed in detail. That one's response to those scenes is a literary response has been brought out by a previous witness." "One's response is, in part or, as it is in any work of art, both to what is being said and how it is said at the same time. Very often, I think that this is a saving grace, for many of the scenes, translated into language of the present, realistic, naturalistic, in the language of the realistic, naturalistic novel could be quite offensive. But I find it not offensive." In his opinion passages in John Updike's "Rabbit Run" and James Baldwin's were just as explicit, if not even more explicit than in Fanny Hill. Mary McCarthy approaches it in a more clinical and less enjoyable way than John Cleland [R. 65].

In answer to the Court's question whether he found books with as many repetitive sexual experiences as this book, Mr. Sproat answered, ". . . in a quantitive court, I would say no, probably." "The episodic nature of the 18th Century novel which often belongs to the genre, makes it almost inevitable that one will have a repetition of the same sort of thing over again." [R. 65].

Mr. Sproat stated that he found the "style itself, the words, the language, the metaphore" "amazing". The metaphore rescues—put it this way, the language transmutes what might have been, what could be a brutal or raw and directly expressed vulgar situation into something literary" [R. 66].

On cross-examination by the Assistant Attorney General, Mr. Sproat stated that he did not find Fanny Hill "vulgar" or "offensive." It was "not great", was "not profound" but had "some value" [R. 66]. The homo-

sexual scene could not, in his opinion, be omitted because "it further developes the character of Fanny" [R. 67]. It was "a minor work of art." [R. 68]. Asked if he thought the book obscene, he answered "If I should answer that—may I ask a question? If I say No, I don't want to be forced to define 'obscene' because I am not sure what you are getting at, but I do not think that— . . . I do not find the book offensive. I do not find the book offensive. I find it erotic." In answer to the question, "Do you feel that the book arouses prurient interest in the reader," he said, "I do feel that I cannot judge. I am not qualified to judge this matter. This is a matter for a sociologist." As he recalled, all of the characters have some relationship to the depicting of a sexual relationship of some sort [R. 68]. In answer to the question, "If we were to remove all the sexual relations out of this book, how much of the book will we have left, proportionately?" he replied, "I would disagree with the former witness who said it was less than 50 per cent of the book that deals with sexual matters." [R. 69].

On re-direct examination, he was asked if the moral value which he testified he found in the book that "sex with love is a good thing" was the only value he found, he stated, "Oh, no. I mean that this was value in the sense of a theme in the book—one of the themes, the development of the character, the structure of the plot, the setting, the style, and so forth and so on. There are other themes, in other words, in the novel. This is one of themes." [R. 70].

Norman N. Holland, Associate Professor of English at M.I.T. testified to his experience. He had been teaching English literature 11 years, two years as a

teaching fellow and 9 years full-time teaching [R. 70-71].

Mr. Holland testified that he had read the book and was of the opinion it has "literary merit and it has other values" [R. 71].

He found it "extremely interesting from the point of view of a literary historian, essentially as a record of the historical, psychological, social events of the period." Cleland occupied an interesting part in the novel of 1748 and its transition from epistolary form to a more straight-forward narrative technique. The descriptions of clothes, prices, customs, the theme of inherited wealth [R. 71] the "insight into the awakening of a woman, into the sexual act, both its normal and its perverted forms", the "sexual tastes of the 18th Century" such as the tendency away from nakedness during the sex act were "an interesting sort of sociological observation" [R. 72].

Mr. Holland testified that in terms of literary merit, he would place Fanny Hill below the works of Fielding's, Joseph Andrews and Tom Jones and above Defoe's Moll Flanders, "which makes it, I would say, not a great novel but certainly a rather good one." In terms of value of a novel, "we would ask that the style and the content work together to create a meaningful expression," [R. 72]. As to the novel's style, the technical term is "pariphrasis" but essentially what is meant is, a spade is not called a spade. "It is masking over the events described by different kinds of metaphores and figures of speech, as, for example, when she is in her encounter with a sailor, she slips into nautical figures of speech. She refers constantly to the male sexual organ as an engine, this kind of thing, which is

pulling you away from the way these events would be described in the 19th or 20th Century." [R. 72]. He thought the style was "a sense of masking over the events described" "Cleland is using the various sexual acts in the novel to trace the moral progress of his heroine". He thought that the sexual content of the novel is part and parcel of the theme and would agree that the theme of the novel in a simplified form, is that sex with love is a good thing, morally, psychologically" [R. 73].

Mr. Holland testified that he found two observations of people's human behavior which were of interest to him. One was the awakening of Fanny as a woman to a woman's mature sexuality, as to which he thought Cleland had considerable insight. The other was the treatment of the masochist, in that Cleland presented the pain as a prepayment for his own guilt which he received out of the pleasure of the sexual relationship, a view of masochism he thought extraordinary in the year 1748 [R. 74].

On cross-examination by the Assistant Attorney General, Mr. Holland stated that he found "A good deal" of "Sexuality, the sexual drive" in the book [R. 74]. The term "engine" and "machine" used for the male sex organ [R. 75] was quite specifically described, but it was in "this funny 18th Century language" [R. 76]. The trial judge commented, "I think I understand a description whether given in the 18th Century or not." Asked if he would use the type of language that is used in the book over the breakfast table with his wife, he replied that he would if he were "so skilled to speak it" [R. 77].

On re-direct examination by the intervenor's attorney, he stated that it had never been thought to be a literary requirement that a novel deal with all aspects of life and the fact that a novel deals with only one aspect of life would not deprive it of its quality of a work of art [R. 78].

Intervenor's attorney offered in evidence Exhibits B through I (Copies of newspapers, and a copy of Life Magazine, dealing with the treatment of the Profumo-Ward scandals in England in June and July of 1963) as bearing on the issue of contemporary community standards [R. 78] *i.e.*, what the general public was reading at about the time Fanny Hill was published by Intervenors in September and October of 1963. The court admitted the exhibits noting, "Just a cursory reading of them indicates that these late events are quite different than those detailed in the book" [R. 81].

Walter Minton, President of G. P. Putnam's & Sons testified that his company had been publishing books since 1838 and that he had been president for 9 years. In its earlier history the company had published some of the writers of the New York school including Washington Irving, James Fenimore Cooper, Edgar Allan Poe; Herman Melville. In more recent years they have published Sholem Asch, Vladimir Nabakov and Pearl Buck [R. 82].

Putnam's & Sons had received a considerable number of orders for the book from colleges and libraries. They had received two communications from the Library of Congress, one requesting the copy of the book which they had failed to file for copyright purposes; the other, a request to translate the book into Braille, "which the

Library of Congress does with a number of books it deems of general interest" [R. 83].

Mr. Minton testified that the book was distributed through the ordinary channels of distribution that Putnam's employed for its lists generally; through normal bookstore accounts and wholesalers who service smaller bookstores as well as supplying public and college libraries [R. 84].

Ira Konigsberg, Assistant Professor of English and American literature at Brandeis University, Waltham, testified to his experience. He had been teaching literature for 9 years and specialized in the 18th Century novel. He was finishing a book that deals with the 18th Century novel from 1700 through 1740 [R. 84].

Mr. Konigsberg testified that he had read the book and was of the opinion that "it is an extremely significant literary work". He based his opinion on three standards: It's significance as a literary document for a modern day reader, its significance in the history of English literature, and its significance in terms of the moral values that a literary work can advocate [R. 85].

Mr Konigsberg testified that in terms of its literary value for the contemporary reader it was a novel that fulfilled the requirements of serious literature. It "attempts to create an illusion of reality for the reader through the creation of realistic characters, realistically portrayed in a semi-credible or realistic situation" and "the various episodes, the chapters, are all unified together for one specific end, and that is the writing of a complete work of art itself." [R. 85].

Mr. Konigsberg testified that in terms of its historical importance, its publication in 1749 was "extremely

significant", "With Fielding's work 'Tom Jones' Cleland's 'Memoirs of a Woman of Pleasure' is a very specific reaction to a kind of literature that was published at the time, that is, the novels, in particular, of Samuel Richardson." [R. 85]. "Richardson believed that chastity was the most important thing in the world; Cleland and Fielding obviously did not and thought there were more important significant moral values." [R. 86]. "to sum up this point," Fanny Hill was of historical importance because it "tells us about a cultural conflict in the 18th Century", "tells us something about the literary plots and character types that were being used" [R. 86] and "tells us something about the development of the English novel as a literary form" which "cannot be emphasized enough" since before 1740 "there is simply no modern English novel". "Cleland is right there at the beginning, and his work is extremely significant in this way" [R. 97]. Cleland's prose style makes him a remarkable "literary stylist of the novel" In his opinion, "Cleland is not one of the six major novelists of the period, but he is significantly better than the rest of the minor figures." [R. 88].

Mr. Konigsberg testified that it was an important literary book because it made a serious statement about life and experience [R. 88].

Mr. Konigsberg stated that the Commonwealth period of extreme expression of freedom of life in 17th Century England was followed by the reactionary Restoration period which was an excessive kind of libertine life and excessive sexual freedom. This in turn was followed by the significant middle-class reaction at the beginning of the 18th Century, of which Richardson, Fielding and Cleland were a part, which had a Puritanical emphasis

upon chastity. In his opinion Fielding and Cleland were "trying to advocate a more wholesome view of life itself and the relationship between the sexes" in reaction to what Richardson was doing [R. 89].

Asked to compare the attitude toward sex in Cleland's book with the same attitude as reflected in a good many contemporary novels such as James Baldwin's "Giovanni's Room", John Updike's "Run Rabbit Run," Mary McCarthy's "The Group", Norman Mailer's "The Naked and the Dead" and James Jones' "From Here to Eternity" [R. 90], Mr. Konigsberg replied that "the treatment in Cleland's novel is obviously more healthy". The contemporary novels "deal with various kinds of love in modern 20th day society, and it is generally treated ruthlessly. That is, the relationship between the sexes is seen as another manifestation of modern decadence, insterility, or perversion. Cleland's point simply is this, that, with love, the relationship between men and women can be a wholesome, healthy, experience itself." [R. 91].

The trial court asked, "What about the three other girls whose history is given in the book besides Fanny? Remember about three other associates of hers in whatever you might call her calling?" [R. 91]. The witness answered, "Well, actually, they are dealt with similarly in a complex manner. If I recall, the three of them end up well. . . ." [R. 91]. Fanny is "quite willing to expose" the various aspects of the three girls' professional life which are "perverse or in bad taste or without love" but "when the actual relationship with men is one composed partly of love, then she is willing not to condemn it but to appreciate it, and the same standard is held with these women." [R. 92]. In answer to the trial court's question, "Would you say these three other girls told

about their experiences with a sense of pride?" or "Sense of exultation?" he replied, "No, I wouldn't use those particular words. I think they are too strong for that. . . ." [R. 92].

Mr. Konigsberg stated that in the modern novel and in art forms we "have an emphasis today upon violation of physical being, upon grotesqueness, upon various kinds of physical injury and harm. This is very prevalent in the modern novel as well as in other art forms. What Cleland is saying is just the opposite, that the human body is something that is wholesome, that is healthy, that is normal, and that is beautiful, and when people come together in love, then in the experience itself is something that is wholesome. . . ." [R. 92-93].

In answer to the trial court's question, "What about the whipping incident" and "The homosexual incident" and "The lesbianism?" the witness replied, "These acts of sexual perversion are there to be juxtaposed to the acts which are partaken in sexual health. Otherwise the point couldn't be made." [R. 93]. In answer to the trial court's question, "Would you describe the description given by the author of these acts as pornographic?" the witness answered, "Could you tell me what you mean by pornographic" and "I don't know what you mean. I know what I would mean by pornographic" [R. 93].

On cross-examination by the Attorney General, Mr. Konigsberg stated that he was presently writing "a scholarly book on the novel". In answer to the question, "Do they deal with sex in the same way that Fanny Hill deals with sex?" he replied, "I can answer that with a qualification. The qualification is no two books can handle sex the same, but they do have a similar

emphasis upon sexual matters, yes." Asked if he could write his scholarly work without the benefit of Fanny Hill, he answered, "Yes, I could, although it would be —." [R. 94].

The attorney for the intervenor rested his case.

In his findings the trial judge reversed his ruling as to Exhibits 1 to 4 and considered them in his deliberation [R. 104]. On September 3, 1964, the trial judge entered extensive findings of fact, rulings of law, and an order for a final decree that the book entitled "John Cleland's Memoirs of a Woman of Pleasure" commonly known as "Fanny Hill" is not entitled to the protection of the First Amendment of the United States Constitution, and finding the said book obscene under the provisions of General Laws, Chapter 272, Section 28 C, E and F, as amended by Statutes 1945, Chapter 278 [R 100-117].

The trial court said, at R-116 "Careful review of all the expert testimony has been made, but, the best evidence of all, is the book itself and it plainly has no value because of ideas, news or artistic, literary or scientific attributes. *Attorney General v. Tropic of Cancer,* 345 Mass. 11, at 16. Nor does it have any other merit. 'This court will not adopt a rule of law which states obscenity is suppressible but well written obscenity is not.' Mr. Justice Scilippi in *People v. Fritch,* 13 N.Y. 2d 119. No 'weighing' of any of its alleged social importance against its prurient interest appeal is needed. 'Hard-core' pornography has no literary merit or social value. *Attorney General v. Tropic of Cancer,* 345 Mass. 11, 15, fn 5. It is concluded that this book is 'utterly without redeeming social importance' in the fields

of art, literature, science, news or ideas of any social importance and that it is obscene, indecent and impure.'" The final decree was entered on December 17, 1964.

The Supreme Judicial Court of Massachusetts affirmed the decision in Attorney General v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure", 206 N.E. 2d 403 (April 22, 1965). This opinion appears at R-120-129.

Summary of Argument.

I.

The public policy of the United States Supreme Court has always championed the obscenity laws. Yet with all of this case law support, the communities are being inundated by a horde of obscenity which the law is not reaching.

The prosecutors are claiming that they have no remedy and that the Supreme Court stands too eager to reverse their successes, when they occur. *Amicus* do not picture this to be the true situation.

This Court recognizes that the debasement of sex has been with mankind down through the centuries and that the obscenity laws are necessary for a strong community life. The *Roth-Alberts* decision is testimony of the fact that criminal penalties are authorized procedures to regulate this type of conduct.

Most of the recent cases before this Court since 1957 have involved "previous restraint" controls, such as movie licensing cases, search warrant procedures, the right of the postmaster to refuse mail on the grounds it is obscene, etc. Whereas an earlier Court in *Near v. Minnesota* had indicated "previous restraint" could clearly be employed against obscene materials, this mod-

ern Court has restricted that interpretation considerably by procedural rules. In doing so, a number of obscenity judgments were reversed on procedural grounds, making it appear that this Court was releasing the matter as not being obscene. Such decisions have misled and discouraged prosecutors.

In several cases the justices have been unable to agree on an "Opinion of the Court." The theories of the case set forth by the individual justices do not lead to an orderly understanding of the law.

On the other hand, this Court has denied review in at least 21 criminal cases which have come before it since 1957. These cases were without opinion and have not been publicized. They are not generally known to the individual prosecutors, who lose heart when they see all losses and no victories.

Then too, some prosecutors do not recognize the distinction between criminal prosecutions and previous restraint cases. The prosecutors need a direct signal from the Court.

II.

The presence of "Fanny Hill" in this Court places the spotlight on the real substantive matters at issue—the concern of government and courts of justice over the corrosive effects which weigh against the people's sense of sexual morality, and the sovereign right of a state government to control conduct relating thereto. Proper consideration must be given to the historic *reasons* for the obscenity laws. It is wrong to concentrate one's attention solely on the rule under which the law is administered.

Two centuries ago the Common Law Courts of England were faced with a historic situation, similar to that

in the present day United States. The community was surrounded with an excessive kind of libertine life, with excessive sexual freedom. To combat these excesses in the field of literature those Courts in 1727 created the Common Law Crime of Obscene Libel. Twenty two years later, the book which is in this Court was first published, and upon publication was caught in the snares of the obscenity laws. It has, since that time, enjoyed over 214 years of suppression.

Appellant cannot assume the disguise of an old line publishing company, having made a very deliberate and substantial move into the production of erotic literature. Other publishers, with lesser reputations, are also producing "Fanny Hill". Most of the other publishers deal exclusively in sex materials. All are interested in capitalizing commercially on its erotic qualities. All operations will be equally affected.

The function of the obscenity laws is to preserve the peace of government by preserving the morality of the people. If vice is tolerated, it affects our standards of morality adversely. The great majority of people believe that the morals of "bad" people do threaten the security of the "good" people and that a minority should not be permitted to flaunt their immoralities where they will shock others. Parents have a right to shape the moral notions of their children and the general public have a right not to be subjected to violent psychological assault.

We contend that strong obscenity law enforcement can assist in reversing the current trend toward anti-social sexual misconduct.

The constitutional test expressed in the *Roth-Alberts* case in 1957 has not been changed. Subject matter whose

dominant appeal is to prurient interest can be proscribed. The interest is either "prurient" or it is "normal." The line between candor and shame is a narrow one. To allow sufficient leeway so as not to inhibit legitimate expression, the proscribed material must be sufficiently over the line. A jury trial in a criminal forum provides this safeguard, as does the requirement that the material must go "substantially beyond customary limits of candor."

Slight social importance does not exculpate where the predominant appeal is to prurient interest. The result is otherwise if the degree of pruriency is submerged and the social interest is the predominant theme.

Subsequent events have indicated that the result in *Grove Press Inc. v. Gerstein* should be abandoned. Neither courts, law enforcement or publishers understand the distinction between "obscenity" and "well-written obscenity." If courts can require decency in expression from attorneys who present ideas in the courtroom, the communities should be able to require the same degree of decency from artists in the market place.

"Fanny Hill" is obscene under all standards. It is essentially an appeal to the "voyeur" perversion.

It has been the universal judgment of history that "Fanny Hill" should be restrained.

ARGUMENT.

I.

AN INTEGRATED REVIEW OF THE OBSCENITY CASE LAW.

A. Public Policy.

The public policy of this Court has always championed the obscenity laws. See *Rosen v. U. S.*, 161 U.S. 606 (1896),[1] decided by the U.S. Supreme Court at the turn of the century. This favored policy is not difficult of understanding. Central to our heritage is the expectation that our Courts should strive to preserve our heritage and should not give scandal[2] by tolerating anything which tends to debase public morals.

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[1]Rosen attempted to escape a jury conviction on an obscenity charge on a technicality. He sought his freedom on appeal, arguing that, because the People had not described the obscenity in their complaint (referred to by the court as "the record"), he had not been properly informed of the nature of the crime. United States Supreme Court Justice John Marshall Harlan, grandfather of the present United States Supreme Court Justice John Marshall Harlan, rejected this plea out of hand and, in invoking the unanimous rule of the courts at that time, drew from the language of an earlier Massachusetts Supreme Court decision at page 608:

> "It can never be required that an obscene book and picture should be displayed upon the records of the court. . . . This would be to require that the People itself should give permanency and notoriety to indecency in order to punish it."

His Massachusetts reference was the first recorded case in the United States against a book, *Commonwealth v. Holmes*, (1821). The book in the Massachusetts case was "Fanny Hill," a century and a half later to find its way before this Court in *A Book Names "John Cleland's Memoirs of A Woman of Pleasure" v. Attorney General of Massachusetts*, October Term, No. 368.

[2]Webster's Collegiate Dictionary, Fifth Edition, defines "scandal" as "The distressing effect on others of unseemly or unrighteous conduct; especially, an occasion of another's lapse in faith or morals as to give scandal to one's children . . . 3. That which offends established moral conceptions or disgraces all who are associated or involved." Tolerance of indecency, for any reason, even for purposes of administration, had the undesirable effect of giving notoriety and acceptance to the material and dignifying its appearance.

Less than 35 years ago this Court underscored this same "favored position" of the obscenity laws when, in *Near v. Minnesota,* 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)[3] the members of that Court made it clear that immunity from previous restraint did not extend to obscene publications.

Eleven years later, not one member of the 1942 Court entertained any doubt that the existence of obscenity was contrary to the people's abiding interest in good public morals. Neither the prevention of publication (previous restraint) nor criminal punishment for dissemination raised any constitutional problems in their view. In *Chaplinsky v. New Hamphsire,* 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942) that Court said at page 571:

> ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."

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[3]"The objection has . . . been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. *But the limitation has been recognized only in exceptional cases.* 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' Schenck v. United States, 249 U.S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. *On similar grounds, the primary requirements of decency may be enforced against obscene publications.*" (Our emphasis.)

Ten years later, the majority of the members of the 1952 Court in *Beauharnais v. Illinois,* 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed 919 (1952) agreed with the *Chaplinsky Court,* adding:

> "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances (clear and present danger) . . ."

When, five years later, in *Roth v. U.S.* and *Alberts v. California,* 354 U.S. 476, 77 S. Ct. 1314, 1 L. Ed 2d 1498 (June 24, 1957), this present Court was faced with a broadside attack on the statutes guarding public decency, seven members of this modern court stood firm and enunciated a solid distaste for obscenity. *Rosen v. U.S. (supra), Near v. Minnesota (supra), Chaplinsky v. New Hampshire* (*supra*), and *Beauharnais v. Illinois (supra)* were all confirmed. The language of *Rosen* was cited with approval. Everyone was charged with notice of what must be deemed obscene. The *Roth-Alberts* majority opinion placed emphasis on the language of *Chaplinsky* noted above. Obscene utterances were of such slight social value as a step to truth that any benefit to be derived from them was clearly outweighed by the social interest in order and morality. The above language of the *Beauharnais* Court was cited with approval. No one could contend that obscene speech could be punished only upon a showing of a clear and present danger.

Under such a regime, it did appear as though the communities had the proper defense mechanisms and the modern assault on public morality could easily be turned back.

Yet with all this unaninity, elegance of language, and profuseness of citation to buttress the foundations of our anti-obscenity fortresses, the stockades are presently in danger of collapsing for lack of riflemen, abetted by confusion. The communities of this nation, eight years later, find themselves with a horde of filth, printed, visual, vocal and otherwise, of unprecedented force, threatening to erode the very foundations of the basic morality upon which our nation and our Constitution were founded.[4] In the face of this peril the public prose-

[4]"A tide of printed filth is advancing across the land in a way which should give every wholesome-thinking person cause to wonder whether it may not erode the very foundations of the basic morality upon which our nation and our Constitution were founded.

In bookstores, railroad stations, air terminals, drug stores, everywhere that print is displayed and pictures revealed, there stand pyramids of smut, pornography and obscenity contaminating the very air in which they rest. Language which would be too raw and grating for the dives of opium-smoking debauchees degrades and defaces the paper which carries it.

Magazines with pictures and sketches that would disgrace oriental harems are sold to children as if they were as innocuous as bags of popcorn. Exotic rites that would bring the blush of shame to the faces of the most primitive tribes are described with nonchalance in high-priced books, medium-priced books, and low-priced books. Themes which should be the subject only for clinical studies in the hospitals for the criminal insane are turned into scarifying stories which are bound to bring harm to the youths into whose hands they fall.

Acts of degeneracy and unnatural conduct are being portrayed in contemporary literature as if they were normal and accepted practice in civilized life. Adultery and every other type of illegal and sinful conduct is being depicted glamorously, as if calling for emulation.

The healthful, romantic, and poetic relationship between man and woman is being treated in the basest and most animalistic terms.

Under the false guise of instruction and knowledge, so-called manuals on marriage are being turned out in myriads of copies for the sole purpose of appealing to prurient and lascivious minds. The sick outpourings of degenerate brains are being bound in hardback books and paperback books and sometimes in elegant and expensive leather. Titles and cover pictures which in themselves

cutor bleats that he has no remedy and that it is useless to prosecute, since the Supreme Court will reverse the jury's findings.

CDL is at complete odds with such ideology. Unlike our knowledge of outer space, which is increasing in geometric proportions through discoveries in space explorations, our knowledge of sex is profound, for sex has been with us since the beginning of mankind. As to the sexual relation, it can be said, with some degree of truth, that there is "nothing new under the sun." Similarly, the assault which has as its objective the debasement of sex has been with mankind down through the centuries. That which motivates the pornographer, in 1965, motivated John Cleland two centuries earlier. Recognition of the universal need for strong community

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are suggestive, pornographic, indecent and obscene shout their vulgarity to passersby.

It used to be that pornographic literature, to the extent that it existed, was sold clandestinely. The secrecy and the furtiveness with which it was sold and circulated was an indication that the public looked upon it as something improper and not in consonance with the morals of the community. But now the most salacious books, the most degrading publications are sold in book stores, drug stores, five and ten cent stores, and at the newsstands. It is difficult to think of a place where print appears that one's eyes and spirit will not be assailed by pornography of the vilest character.

In short, a wide river of filth is sweeping across the nation, befouling its shores and spreading over the land its nauseating stench. But, what is most disturbing of all, is that persons, whose noses should be particularly sensitive to this olfactory assault, do not smell it at all. I refer to district attorneys and prosecuting officers throughout the nation. Of course, there are a large number of district attorneys in the country who are doing their duty and doing it well, but a larger number of prosecuting officials are shrugging unconcerned shoulders at this violent assault on law, morality and decency."

. . . From an address given by Associate Justice Michael A. Musmanno of the Pennsylvania Supreme Court at the Waldorf-Astoria New York City on October 23, 1965.

controls in this modern era has amply been witnessed by this Court in *Roth-Alberts* when it said at page 484:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1942 to 1956. . . ."

Nevertheless, there is, in our opinion, a crisis facing this nation which requires the members of this Court to bear witness through concrete action and to drive home, once and for all, the basic fact, which is escaping so many at the present time, that this Court really has not, in its decisions since *Roth-Alberts* underwritten the sale of "perversion for profit."

If we understand correctly what has occurred in the ensuing years since *Roth-Alberts,* this Court has not altered the basic position taken by it in those cases; namely that criminal cases which applied the proper standard for judging obscenity, did not offend constitutional privileges. This Court held at page 492:

> "In summary then, we hold *that these statutes, applied according to the proper standards for judging obscenity, do not offend constitutional safeguards against convictions* based upon protected material, or fail to give men in acting adequate notice of what is prohibited. . . ." (Our emphasis).

B. The Problem of Previous Restraint Cases.

Unfortunately, a line of cases followed which enjoyed in common the element of previous restraint,[5] a factor not present in the *Roth* and *Alberts* cases, which authorized criminal penalties as the just consequences of the defendants' temerous conduct. This Court did not react as favorably to this new issue as the earlier Courts in *Near v. Minnesota (supra)* which had *excluded previous restraint controls* in the case of *obscene publications from the operation of the Blackstone rule,* which held that:

"The liberty of the press is indeed essential to the

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[5]Previous (prior) restraint was a major issue in each of the following: *Times Film Corporation v. City of Chicago,* 355 U.S. 35, 78 S. Ct. 115, 2 L. Ed. 2d 72 (1957) (Movie license—no opinion), reversing 244 F. 2d 432 (7th Cir. 1957) and 139 F. Supp. 837 (1956); *Mounce v. U. S.,* 355 U.S. 180, 2 L. Ed. 2d 187 (1957) (customs case—no opinion), reversing 247 F. 2d 148 (9th Cir. 1957) and 134 F. Supp. 490 (1955); *One Inc. v. Olesen,* 355 U.S. 371, 78 S. Ct. 364, 2 L. Ed. 2d 352 (1958) (right to deposit mail—no opinion) reversing 241 F. 2d 772 (9th Cir. 1957); *Sunshine Book Co. v. Summerfield,* 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 2d 352 (1958) (right to deposit mail—no opinion) reversing 249 F. 2d 114 (D.C. Circuit 1957) and 128 F. Supp. 564 (1955); *Times Film Corp. v. City of Chicago,* 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403 (Jan. 23, 1961) (movie license) reversing 272 F. 2d 90 (7th Cir. 1959) and 180 F. Supp. 843 (1959); *Marcus v. Kansas City Search Warrants,* 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (June 19, 1961) (Seizure), reversing 344 S.W. 2d 119 (1960); *Manual Enterprises Inc. v. Day,* 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (June 25, 1962) (right to deposit mail), reversing 289 F. 2d 455 (D.C. Circuit 1961) *Bantam Books Inc. v. Sullivan,* 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (Feb. 18, 1963) (Warnings) reversing 176 A. 2d 393; *A Quantity of Books v. Kansas,* 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (June 22, 1964) (Seizure), reversing 191 Kan. 13, 379 P. 2d 254 (1963); *Freeman v. Maryland,* 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (Mar. 1, 1965) (Movie license), reversing 233 Md. 458, 197 A. 2d 232 (1964); *Trans-Lux Distributing Corp. v. Board of Regents of the University of New York,* 380 U.S. 259, 85 S. Ct. 952, 13 L. Ed. 2d 959 (1965) (movie license—no opinion). Reversing 14 N.Y. 2d 88, 248 N.Y.S. 2d 857 (1964).

nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity" 4 Bl. Com. 151, 152.

The cloud of confusion which was to appear was forecase in *Kingsley Book Inc. v. Brown,* 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (June 24, 1957), decided on the same day with *Roth-Alberts.* In that case, this Court split five-to-four in approving the New York injunctive action, which authorized limited previous restraint. It was here that Justice Brennan and Warren parted company with the majority in the *Roth* and the earlier Courts.

The confusion and disruption commenced one year later with the *per curiam* reversals without opinion in the *Times Film Corporation, One Inc.,* and *Sunshine Book Co.* cases[6] (cited in footnote 5). Later written

[6]For example, the claim is widespread that Sunshine Book Company stands for the proposition that nudist magazines are not obscene, no matter what may be the publisher's or disseminator's intent, the format, method of distribution, policy of the state etc. See here the recent result in *Connecticut v. Martin et al.* (June 17, 1965), where the Appellate Division of the Circuit Court reversed (2-1) an extremely well reasoned trial court opinion, solely upon the basis of the *Sunshine Book Co.* case. We believe such claim to be utterly groundless. See *Outdoor American Corporation v. City of Philadelphia,* 333 F. 2d 1963 (June 30, 1964) certiorari denied 85 S. Ct. 192, 13 L. Ed. 2d 176 (Nov. 9, 1964); *Luros v. Hanson,* petition for certiorari filed Sept. 27, 1965, Oct. Term, 1965 No. 620; *Hadley v. Arkansas,* 205 Ark. 1027, 172 S.W. 2d 237 (1943); *King v. Commonwealth,* 233 S.W. 2d 522 (Oct. 20, 1950); *Missouri v. Becker,* 364 Mo. 1079, 272 S.W. 2d 283 (1954), cited with approval in

opinions in *Marcus, Manual Enterprises, Inc.* and *A Quantity of Books* gave specific recognition to the fact that the obscenity issue was not reached in this Court's reversals of those lower Court judgments on previous restraint grounds. What factor the previous restraint element played in the 1958 decisions will never be known.[7] Subsequent opinions have revealed a common disagreement between the justices on what constitutes the vital phase of the case. See the No Clear Majority Decisions, *infra*. Then too, the Court's membership has changed.[8]

As breeding grounds, the 1958 *per curiam reversals* acted with catalytic action to spawn the "hard core pornography" rule in one of the major centers of pornopraphic production in the United States. *New York v. Richmond County News Co.*, 175 N.E. 2d 681 (May 25,

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Roth-Alberts at footnote 26; *Sunshine Publishing Co. v. George N. Parris* (unreported, Circuit Court, Macomb County April 29, 1963); *Nebraska v. Jungclaus*, 176 Neb. 641, 126 N.W. 2d 858 (Mar. 13, 1964); *Dale Book Co. v. Leary*, 233 F. Supp. 754 (Aug. 12, 1964); *City of Phoenix v. Fine* (unreported, Superior Court Maricopa County, Arizona, Jan. 22, 1965); *Missouri v. Vollmar*, 389 S.W. 2d 20 (Mar. 8, 1965); *Virginia v. Dave Rosenbloom* (unreported, Suffolk County, Richmond, Virginia, June 10, 1965); *Arizona v. Arizona Magazine Distributors Inc.* (unreported, West Phoenix Justice Court, Maricopa County, Aug. 26, 1965); *Arizona v. Al Sacks* (unreported, West Phoenix Justice Court, Maricopa County, Sept. 1, 1965).

[7]The *per curiam* decisions are criticized in "Obscenity, Pornography and Censorship by Thomas R. Mulroy of the Illinois Bar in 49 American Bar Association Journal (Sept. 1963) at 869. The author cites Justice Jackson's remarks on the empirical reversal of a case without opinion in *Brownell v. Singer*, 347 U.S. 403 (1954):

> "The Court's one-word decision reverses concurring judgments of three highly respected courts . . . (by citing) a single case. . . . I think this Court owed those Courts and the legal profession something more than reference to an inapplicable decision."

[8]Justices Frankfurter, Whittaker and Burton have been replaced by Justices Fortas, White and Stewart.

1961.)[9] Abetted by a misconstruction of the no clear majority opinion decision in the *Manual Enterprises Inc.* case and a misapplication of the special view entertained by Justice Harlan in federal cases, the "hard core pornography" rule spread to the other major centers of pornographic production. *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, 31 Cal. Rptr. 800 (July 2, 1963).[10]

C. The No Clear Majority Decisions.

The common disagreement between the justices has given birth to a number of "no clear majority" decisions which confound and confuse.[11] *Manual Enter-*

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[9]There is reason to believe that had Justice Desmond recognized the significance of the previous restraint issue in the 1958 cases, his deciding vote would have been cast differently and the minority in that case would have prevailed. See Justice Desmond's concurring opinion in the *Richmond County News Co.* case, his concurring opinion in *People v. Fritch,* 13 N.Y. 2d 119 (June 10, 1963), and his dissenting opinions in *Larkin v. G. I. Distributors Inc.,* 14 N.Y. 2d 869 (June 10, 1964); *Larkin v. G. P. Putnam's Sons,* 14 N.Y. 2d 399 (July 10, 1964); *People v. The Bookcase Inc. et al.,* 14 N.Y. 2d 409 (July 10, 1964).

[10]That the California Supreme Court misinterpreted the Harlan view seems apparent from Justice Harlan's vote to deny certiorari in *Grove Press Inc. v. Gerstein,* 378 U.S. 577 (June 22, 1964), a state case. The language of the *Zeitlin* case suggests however, that the author would have come by the same result no matter how he chose to interpret Justice Harlan's opinion in the *Manual Enterprises case.*

[11]One of the basic postulates of the American case law system is that the decision of a majority determines the result, and an "opinion of the court" is written expressing the reasoning agreed upon by the majority. When a majority agree on the result, the decision is final as between the litigants. When a majority agree in the reasoning for the result, the opinion which expresses this reasoning is called the "opinion of the court." If a majority agree on the result, but do not agree in the reasoning for the result, there is no "opinion of the court," even though the controversy is ended as between the parties to the lawsuit.

The decision plus the reasoning found in the "opinion of the court" determine the precedent value of any particular case. In many obscenity cases, however, there has been no "opinion of

prises Inc. v. Day, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (1962); *Jacobellis v. Ohio,* 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964); *A Quantity of Books v. Kansas,* 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964); *Grove Press Inc. v. Gerstein,* 378 U.S. 577, 84 S. Ct. 1909, 12 L. Ed. 2d 1035 (1964); *Tralins v. Gerstein,* 378 U.S. 576, 84 S. Ct. 1903, 12 L. Ed. 2d 1033 (1964). The order in appearance of an opinion, rather than solid precedent, often controls the destiny of the people's defenses against the assaults on public morality.[12]

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the court," as where the majority have agreed *only* upon the *result,* (*i.e.,* judgment reversed) but have not been able to agree upon the supporting reasoning.

Text books on judicial precedent indicate that theoretically the "no-clear-majority" decision stands only for its general result. See Wambaugh, *The Study of Cases* (Second Edition, 1894), at page 50:

> "Even when all the judges concur in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially. . . . 'There must be a concurrence of a majority of the judges upon the principles, rules of law, announced in the case, before they can be considered settled by a decision. If the court is equally divided or less than a majority concur in a rule, no one will claim that it has the force of the authority of the court.' "

See also Black, *Handbook of Judicial Precedent* (1912), pages 135-136:

> "If all or a majority of the judges concur in the result . . . but differ as to the reasons which lead them to this conclusion, the case is not an authority except upon the general result."

[12]The confusion of the State courts as to what is taking place in the United States Supreme Court is spotlighted in *Arizona v. Locks,* 97 Ariz. 148, 397 P. 2d 949 (Dec. 30, 1964). That court said, in error, at page 951:

> "This was followed by *Manual Enterprises Inc. v. Day,* 370 U.S. 478 . . . *holding* the publication of photographs of nude male figures designed to appeal to homosexuals not to be so obscene as to lose the protection of the First Amendment. (Our emphasis)."

The Arizona Supreme Court's reversal of a jury decision on girlie magazine subject matter was based largely on a compari-

D. A Major National Problem.

In the absence of knowledgeable defending riflemen, compounded by the confusion, those well-buttressed fortresses are being subjected to a withering attack. On October 21, 1965, the Los Angeles County Grand Jury returned a two count indictment against 14 defendants in *California v. Milton Luros, et al.,* Superior Court case No. 295,183, for conspiracy to manufacture and distribute girlie magazines, nudist magazines and nine lesbian-type paperback books (including Fanny Hill). On February 15, 1965, the count covering the girlie and nudist magazines was dismissed without trial in a pre-trial motion to dismiss the indictment. Superior Court Judge Walter R. Evans, in dismissing, had this to say:

> "In view of the time I have had to study it, I have found it extremely interesting, but absolutely amazing. I was concerned as to the extent to which the United States Supreme Court—I am very frank to say, and I think I am entitled to say it, that I disagree wholeheartedly with the United States Supreme Court cases. I think the so-called founding fathers who promulgated our Constitution probably would turn over in their graves if they saw the extent to which the United States Supreme Court has stretched the protection to this type of material which to me, has no value to anybody. However, that is my personal position. I want to get that off my chest. I think there is nothing but filth from beginning to end in this material. However,

son with this erroneous reference and belief that Justice Harlan's opinion was the opinion of the Court. The Arizona Court had indicated a different view on the subject matter when the case was before it previously in 372 P. 2d 724 (June 20, 1962) and 382 P. 2d 241 (May 25, 1963).

that is my personal opinion, and I think that counsel pointed out that I still have an obligation to follow what I think are the rules laid down by the United States Supreme Court. I was interested in reading one of the learned justices who said that maybe some day the balance will start swinging back where honesty and decency would start entering into a consideration of this thing. I hope it will."

He thought eight of the lesbian-type paperbacks (but strangely, not Fanny Hill) a jury issue, and Count 2 was set for trial. The people's action was short lived however. Although both the District Court of Appeal and the California Supreme Court thereafter refused the defendants a writ of prohibition on the count involving the lesbian-type paperback books, Trial Judge Joseph Sprankle dismissed the case, without trial on June 14, 1965. The books' titles, Lesbian Sin Song, Two Women in Love, Counterfeit Lesbian, Lesbian Captive, Lesbians in White, The Girls at Wendy's, The Three Way Apartment and Honey Lips, sung out the perversion they peddled.

In another action by the people—this time against a notorious national disseminator located in New York—a criminal obscenity indictment was short-circuited by trial judge J. Irwin Shapiro, when he dismissed *New York v. Ray Kirk, Birch, All State News Co. Inc., et al.*, 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sept. 6, 1963) without trial. In so holding, Judge Shapiro refused to follow controlling precedent in his state, for one of the books supporting the indictment had already been held obscene by New York's highest court in *New York v. Harry Fried*, 18 A. 2d 996, 238 N.Y.S. 2d 742 (Mar. 26, 1963). Appeal dismissed for want of jurisdiction.

Treating the paper whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied (Justice Black, Douglas and Stewart are of the opinion probable jurisdiction should be voted and judgment reversed 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 (June 22, 1964).[13]

E. A Problem of Communication.

The confused results reached in the lower courts noted above does not seem warranted to CDL, when one considers the overwhelming weight of case law in the opposite direction. The key to an awakening of law enforcement seems bound up in the remarks of Chief Justice Warren in *Jacobellis v. Ohio (supra)* at page 1684:

> ". . . This Court hears cases such as the instant one not merely to rule upon the alleged obscenity

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[13]Federal courts are equally confused. See *United States v. Klaw and Jack Kramer,* 350 F. 2d 155 (2nd Circuit July 15, 1965) and *Haldeman v. U.S.,* 340 F. 2d 59, 62 at fn. 6 (10th Cir. Jan. 13, 1965):

> "Mr. Justice Stewart, concurring in Jacobellis, declined to define the term 'hard-core pornography,' but stated: 'I know it when I see it . . .' The writer of this opinion has also felt that he would 'know it when he saw it' but a reading of some of the published material held to be constitutionally protected tends to raise doubts regarding one's perceptive abilities in such matters . . ."

When District Judge George Templar found himself reversed as the trial judge in the *Haldeman* case, he turned around and dismissed two major federal grand jury indictments against nationally notorious smut peddlers: Louis Linetsky aka John Amslow & Co. in *United States v. Linetsky,* No. T-CR 582 (D.C. Kansas) (June 24, 1965) and an equally notorious smut merchant in *United States v. Wasserman* (D.C. Kansas) No. T-CR-581 (June 29, 1965). The former involved girlie magazines and illustrations of females in the nude and the latter involved motion picture films. Compare these results with *Roth-Alberts (supra); Frank L. Collier v. U.S. (infra); Herman L. Womack v. U.S. (infra); Chobot v. Wisc. (infra); Roy A. Oakley v. U.S. (infra) Monfred v. Maryland (infra); Heinecke v. U.S. (infra); Goldstein v. Virginia (infra); Wenzler and Imlay v. Calif. (infra).*

of a specific film or book but to establish principles for the guidance of lower courts and legislatures. *Yet most of our decisions since Roth have been given without opinion and have thus failed to furnish such guidance. . . .*" (our emphasis).

With the exception of the four *per curiam* decisions in 1958, the only obscenity decisions since Roth-Alberts which have been without opinion, were those in which this Court has dismissed an appeal or denied certiorari. This Court should call attention to these decisions denying certiorari and dismissing appeals. In so far as we have been able to ascertain they are 21 in number:

John G. Matthews v. Florida, writ of certiorari denied 356 U.S. 918, 78 S. Ct. 702, 2 L. Ed. 2d 714 (March 31, 1958), notwithstanding the similarity of the statute to the Michigan Statute in *Butler v. Mich.,* 352 U.S. 80;

Wyman Hulan Parr v. U.S. (film), 255 F. 2d 86, writ of certiorari denied 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64 (Oct. 13, 1958);

Max Padell v. U.S. (paperback books), 262 F. 2d 357, writ of certiorari denied 359 U.S. 942 79 S. Ct. 723, 3 L. Ed. 2d 676 (March 23, 1959);

Robert H. Cain v. U.S., 274 F. 2d 598, writ of certiorari denied 362 U.S. 952, 80 S. Ct. 864, 4 L. Ed. 2d 869 (April 18, 1960);

Samuel R. Hochman v. U.S. (paperback books: "The Sex Factory" and "Virgins Come High") 277 F. 2d 631, writ of certiorari denied (Justices Black and Douglas voted to grant certiorari) 364 U.S. 837, 81 S. Ct. 70, 5 L.

Ed. 2d 61 (Oct. 10, 1960) rehearing denied, 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 (Nov. 21, 1960);

Frank L. Collier v. U.S. (photographs of nude young men) 283 F. 2d 780, writ of certiorari denied 365 U.S. 833, 81 S. Ct. 746, 5 L. Ed. 2d 744 (March 6, 1961);

Herman Womack v. U.S. (photographs of nude young men) 294 F. 2d 204, writ of certiorari denied 365 U.S. 859, 81 S. Ct. 826, 5 L. Ed. 2d 822 (March 27, 1961);

Astore v. U.S. (film) 288 F. 2d 26, writ of certiorari denied, 366 U.S. 925, 81 S. Ct. 1352, 6 L. Ed. 2d 384 (May 15, 1961);

Joseph Chobot v. Wisconsin (girlie magazines: "Spice" "Adam" "Spree" and "Blondes, Brunettes, and Redheads") 12 Wis. 2d 110, 106 N.W. 2d 286, appeal dismissed for lack of a federal question (Justices Black, Douglas and Harlan voted for probable jurisdiction), 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85 (Oct. 23, 1961) rehearing denied 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961);

Roy A. Oakley v. U. S. (unretouched photographs of naked young women) 290 F. 2d 517, writ of certiorari denied 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 (Oct. 23, 1961) rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961);

Harry Monfred et al. v. Maryland (girlie magazines: "Candid" "Consort" "Sextet" "Cloud 9" "Torrid"), 226 Md. 312, 173 A. 2d 173, writ

of certiorari denied 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2d 386 (Jan. 8, 1962);

Alfred J. Heinecke v. U.S. (Photographs of nude young men—similar to *U.S. v. Womack*) 294 F. 2d 727, writ of certiorari denied (Justices Black and Douglas voted to grant certiorari), 368 U.S. 901, 82 S. Ct. 173, 7 L. Ed. 2d 96 (Nov. 6, 1961);

Harold S. Kahm v. U.S. (for description of subject matter, see 300 F. 2d 78 at 82), 300 F. 2d 78, writ of certiorari denied 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 (April 23, 1962);

Louis Finkelstein et al. v. New York (paperback books: "Garden of Evil" and "Queen Bee"), 229 N.Y.S. 2d 367, 183 N.E. 2d 661 writ of certiorari denied (Justice Douglas voted to grant certiorari), 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962);

Harold Zucker v. New York (3 sado-masochistic books similar to 50 books involved in *New York v. Mishkin,* also before this court), writ of certiorari denied (Justice Douglas voted to grant certiorari) 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962);

Arthur Goldstein v. Virginia (girlie magazines) writ of certiorari denied 372 U.S. 910, 83 S. Ct. 726, 9 L. Ed. 2d 720 (Feb. 18, 1963);

Edward Mishkin v. U.S. (books not named), 317 F. 2d 634, writ of certiorari denied 375 U.S. 827, 84 S. Ct. 71, 11 L. Ed. 2d 60 (Oct. 14, 1963);

John Darnell, III, v. U.S. (obscene letter), 316 F. 2d 813, writ of certiorari denied (Justice Douglas voted to grant certiorari), 375 U.S. 916, 84 S. Ct. 205, 11 L. Ed. 2d 155 (Nov. 12, 1963), rehearing denied, 375 U.S. 982, 84 S. Ct. 493, 11 L. Ed. 2d 429 (Jan. 6, 1964);

Nirvana Ward Zuideveld v. U.S., 316 F. 2d 873, writ of certiorari denied, 376 U.S. 916, 84 S. Ct. 671, 11 L. Ed. 2d 612 (Feb. 17, 1964);

Harry Fried v. New York (paperback books: "College for Sinners" "Sex Cat" and seminude photographs of women), 238 N.Y.S. 2d 742, appeal dismissed for lack of jurisdiction. Treating the papers wherein the appeal was taken as a petition for writ of certiorari, certiorari is denied (Justices Black, Douglas and Stewart are of the opinion that probable jurisdiction should be noted and judgment reversed), 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 (June 26, 1964);

Samuel Dodd Williamson v. California (paperback book: "Fear of Incest"), 207 Cal. App. 2d 839, 24 Cal. Rptr. 734, writ of certiorari denied (Justice Doulas voted to grant certiorari), 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied .... U.S. ...., 85 S. Ct. 13, 13 L. Ed. 2d 77 (Oct. 12, 1964);

Harold Eugene Wenzler, Sr., and John Imlay v. California (8 mm movie, 12 minutes—"First Fling" described as girlie magazine subjects in motion) writ of certiorari denied (Justice

Douglas voted to grant certiorari), 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied, ... U.S. ...., 85 S. Ct. 14, 13 L. Ed. 2d 77 (Oct. 12, 1964).

There is rarely any mention made in a trial court or in a State Supreme Court of any of the criminal convictions, which this Court has refused to reverse, or the obscene matter involved in those cases. The rare exception is *Connecticut v. Andrews,* 150 Conn. 92, 186 A. 2d 546 (1962), which, in answer to the defendant's claim that the girlie magazines "Modern Man" (July 1960) and "Modern Man—Yearbook of Queens" were not obscene, said:

> "The defendant's claim that there were no obscene magazines to support his conviction on the first and second counts is without merit. Monfred v. State, 226 Md. 312, 317, 173 A. 2d 173, Cert. denied, 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2 386; State v. Chobot, 12 Wisc. 2, 110, 116, 106 NW2 286, dismissed, for lack of a substantial federal question, 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed2 85. . . ."

The end result it that the people's cause suffers. The bad cases are highlighted and the good cases go unnoticed.

The Connecticut Supreme Court has recognized what in our opinion appears to be good logic and good law. If the United States Supreme Court must, in each instance make a constitutional judgment as to whether any given subject matter is either, as a matter of law, protected speech; or a question of fact on the issue of obscenity, for the jury to decide, then a denial of review

(either by dismissal of an appeal or by denial of certiorari) places the material in the latter category.[14]

F. Reconciling the Cases.

When the obscenity statutes have been applied as *criminal statutes* trying "conduct," the People's case has met with no opposition from the United States Supreme Court, except in the case of *Jacobellis v. Ohio,* 378 U.S. 184, 84 S. Ct. 1674. Unfortunately, the United States Supreme Court has failed to publicize such results by way of formal opinion.

Justice Warren, in his dissenting opinion, in *Jacobellis v. Ohio,* 84 S. Ct. 1674 (June 22, 1964), makes it clear that this Court is not defending obscenity, but that *it only appears to do so* when it is faced with procedurally bad cases, at page 1685:

> "There has been some tendency in dealing with this area of the law for enforcement agencies to do only that which is easy to do— for instance, to seize and destroy books with only a minimum of protection. As a result, courts are often presented with procedurally bad cases and, in dealing with them, appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared and were conducted with the appropriate concern for constitutional safeguards, courts would not hesitate to enforce the laws against obscenity."

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[14]The general rule of law that denial of certiorari means "nothing" or "nothing much," would seem to have little application in free speech cases. See *Supreme Court Practice,* 3rd Ed., Stern and Gressman, P. 182, where the authors discuss this point in writs of habeas corpus cases.

Our analysis points to a major point of distinction between those cases which draw into issue the conduct of an individual and those which involve "prior restraint." The final results have certainly been distinguishable. The seven year history points to a course of conduct which has meaning.

The "procedurally bad cases" referred to by Justice Warren were not criminal cases involving "conduct" but were the cases cited in footnote 5, involving "prior restraint." Where difficulty has been encountered, it has been in the area of "prior restraint" by administrative officials (motion picture censor boards and Postmaster cases and mass seizures under search warrants). "Due process" considerations were a major issue in such cases. See here, the four *Per Curiam* decisions in 1958 (prior restraint—no jury trial on the issue of obscenity; material kept from mails in preference to criminal trial for disseminating obscene material, vendor required to prove his right to distribute by injunctive action); *Marcus v. Kansas City Search Warrants,* 367 U.S. 717, (prior restraint—mass seizure under general search warrant, non-criminal proceeding aimed at destruction of subject matter rather than at conduct of vendor); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 48 (prior restraint—boycott, rather than criminal trial of vendor); *Manual Enterprises, Inc. v. Day,* 370 U.S. 478 (prior restraint—material kept from mails in preference to criminal trial for disseminating obscene material, vendor required to prove right to distribute by bringing an injunctive action); *A Quantity of Books v. Kansas,* 84 S. Ct. 1723 (prior restraint—mass seizure, non-criminal proceedings aimed at destruction of subject matter, rather than at conduct of vendor, no right to jury trial on issue of obscenity). *Freedman v. Maryland,* 380 U.S. 51 (prior restraint—movie censor board, exhibitor required to prove his right to exhibit by injunctive action);

Trans-Lux Distributing Corp. v. Board of Regents of New York, 380 U.S. 259 (prior restraint—movie censor board, exhibitor required to prove his right to exhibit by injunctive action).

In all of these cases, the People could have brought the criminal action and held the defendant accountable for his "conduct" (with the procedural safeguards of criminal procedure, *i.e.,* jury trial and burden of proof) and avoided the prior restraint issue. They chose the "prior restraint" attack in preference, unaware that this Court's policy was to give *Near v. Minnesota* as narrow a construction as possible. Unfortunately, the disinterested prosecutor pictured above, at this late date, is unaware of this basic distinction in the case law. Furthermore, he is unwilling to pursue the distinction, without a more direct signal from this Court.

The appeal herein places in issue the very foundations upon which the obscenity laws draw their life. "Fanny Hill" has had widespread recognition in the underground trade as a classic in pornography, and appellant is its publisher.[15] Although as in rim civil action, rather than a criminal case, it has none of the previous restraint defects found objectionable in *Kingsley Inc. v. Brown* (*supra*). Further, appellant had the right to a jury trial, which he elected not to claim.

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[15]The reporter's comments in the American Law Institute, Model Penal Code (1957 draft) section 207.10 at page 13:

> "The main purpose of Section 207.10 is to suppress commerce in the obscene. If production and circulation of obscene material for gain can be eliminated, the supply would be cut off at the source . . ."

II.

THIS COURT SHOULD AFFIRM THE JUDGMENT.

A. "Fanny Hill"—A "Leveler" of the Issues.

It is poetic justice that "Fanny Hill" should find its way into the court room for consideration as an abstract idea at the same moment in history that this High Court has before it for review cases involving the conduct of Ralph Ginzburg and Edward Miskin dealing with related matters. Without this book and its history, those cases would lose their reality alongside the semantic adventures in case law which have flooded this nation's court rooms in the eight years of distortion which have followed *Roth-Alberts, supra.* The presence of "Fanny Hill" acts as a poultice to draw this Court's attention to the real substantive matters which are at stake—the concern of government and courts of justice over the corrosive effects which weigh against the people's sense of sexual morality and the sovereign right of a state government to control conduct relating thereto.

Even in this Court's majority opinion in *Roth,* the realities of the moment[16] were barely discernable.[17]

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[16]Roth received a 5-year jail sentence, Alberts a 60-day jail sentence. Putting aside the theoretical arguments of how this Court acts in certiorari (Roth) and appeals (Alberts) matters on the federal questions raised in jurisdictional statements, amicus have too great a respect for appellate justice not to be convinced that the 1957 Court did pass on the subject matter. Failure to do so under such circumstances would be an admission that justice is blind and little better than that received in a trial court from the hands of a prejudiced jury which refuses to convict on proper evidence. We prefer to believe that the majority did look at the subject matter, and under the test approved by the Roth author in his dissenting opinion in *Kingsley Book Inc. v. Brown,* 354 U.S. 436, 448, agreed with the trial judge that such materials presented a fact question, exclusively for the consideration of the trial court, *i.e.,* that reasonable men may differ whether the material is obscene. Footnote 8 in *Roth,* at page 481 that

It was almost as though Samuel Roth and David Alberts did not exist. What the defendants were doing in those cases, and society's right to concern itself with such conduct—these historical facts and issues were forgotten. It is the tragedy of that case that the two concurring opinions which supplied the missing quantity[18] were thereafter to be responsible for distortions[19] in mean-

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"No issue is presented in either case concerning the obscenity of the material involved" is consistent with this construction of the case.

[17]The actual morai issue was treated superficially by the majority opinion. It merely confirmed the historic precedents, noting the Chaplinsky reference to "social interest in order and morality" and recorded the judgments of history which rejected obscenity. As "mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956."

[18]That the corrosive effects weighing upon the people's sense of sexual morality are a proper concern of government. Justice Harlan asked at page 501: "What, then, is the purpose of this California statute? Clearly the state legislature has made the judgment that printed words can 'deprave or corrupt' the reader —that words can incite to antisocial or immoral action' The assumption seems to be that the distribution of certain types of literature will induce criminal or immoral sexual conduct." Answering this he said: "The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of material, the essential character of which is to degrade sex, will have an eroding effect on moral standards. . . ."

Justice Warren said at page 495: "The defendants in both these cases were engaged in the business of purveying textual or graphic material openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful cravings for material with prurient effect. I believed that the State and Federal governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide. . . ."

[19]For example, the closing arguments of appellant's attorney where he said concerning the concurring opinions [R. 95] . . . "The Court considered only that question. It did not consider whether the materials involved were in fact obscene or in law obscene. It considered only that single question, can anti-obscenity legislation under any circumstances have a constitutional

ing of the majority opinion, which the concurring opinions in no way intended.

As a consequence of a willingness of courts to dwell exclusively upon the *Roth* formula and to forget the reasons therefor, we find that the simple test formulated in *Roth-Alberts, i.e.,* that material is obscene when the dominant theme is an appeal to prurient interest, has been distorted out of reason with measurable success in both trial and appellate courts and is being urged at great length now in this Court as to the very object against which the rule was originally applied. Such become the vagaries of the law, when the rule overshadows the reason[20] for the law.

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application? The answer of a majority of the court was Yes. *Four judges dissented.* . . . The five judge majority, however, said Yes with a very important qualification, and that was that such statutes have only the narrowest application. . . ." (Our emphasis.) The statement is fallacious. The concurring opinions were just that, making it more like a 7-2 majority. Yet the trial judge's reasoning was momentarily distorted, for after the closing arguments his offhand statement was [R. 100]: "This is the type of case where, as counsel pointed out, there is a great deal of difference of opinion as to facts and the weight to be given. The United States Supreme Court decided on a 5-4 decision. . . ."

[20]The reason of the law is the life of the law; for though a man can tell the law, yet, if he know not the reason thereof, he shall soon forget his superficial knowledge. But when he findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the understanding of that particular case, but of many others. Coke, First Institute 183. "The corrupting influence on order and morality must be kept in mind in considering obscenity. To lose sight of the objective of the law by narrowly considering only the prurient appeal aspect of the obscenity law is to become so enamored with a means as to lose sight of the end. Obscenity is prohibited not just because it excites the sexual appetite but rather because such excitation has a "corrosive effect upon the public sense of sexual morality. The goal of the law is the protection of the public interest in order and morality." Censorship, Government, Obscenity, Terrence Murphy, Helicon Press, p. 183.

It is not accidental that "Fanny Hill" should appear again on the scene at this moment. Such reasonably was to be expected as a natural consequence of the distortions which have crept into the obscenity laws in the years since *Roth,* and the cycles which occur in history. On this latter point, it has been well observed that, if a nation is to be assured of its continuance, its people must look backwards and take note of the lessons of history.

B. The Common Law Court's Reaction to Obscenity and "Fanny Hill".

Two centuries removed from the Common Law origin of the obscenity crime, this nation finds itself in the same straits which required the English Common Law Courts to "create" the obscenity laws originally. A tide of printed filth is advancing across the land in a way which should give every wholesome thinking person cause to wonder whether it may not erode the very foundations of the basic morality upon which our nation and our Constitution were founded. A leading educator recently observed that we are the *first* generation of Americans to permit our authors and playwrights to wallow in filth. The history of England has completed its cycle, reappearing in the English-speaking "New World". "Fanny Hill" has been a part of both cycles.

Appellant himself, in his defense of "Fanny Hill", draws this Court's attention to the historical reference and precedence which should decide the merits of this and the other obscenity matters which are on this Court docket. In his testimony, Mr. Konigsberg [R. 89] called the trial court's attention to the cyclic reference to which we refer, albeit with a different connotation.

His reference to the year in which Cleland wrote, as a part of a "cultural battle concerning life" was for the purpose of attributing "historic value" to the book in an attempt to redeem it from its obscenity. It was, in his words, a part of the transitional period in the cycle from the 17th Century Commonwealth Period, with its extreme suppression of freedom of life, to the Restoration Period, with its excessive kind of libertine life and excessive sexual freedom, and the 18th Century Purtianical reaction, with its emphasis upon chastity as a reaction to the Cavalier attitude of the Restoration Period. In his view, Cleland's writings were a "reaction" to the mores which were taking shape in the year 1749.

We refer to the same cycle, but for a different purpose—that of inviting this Court's attention to the manner in which the Common Law courts of that era reacted to the identical problem that appellant publisher presents in this appeal. The association, of course, is quite relevant, for it was from this heritage that our nation and the State of Massachusetts received its obscenity laws.

The middle class reaction to the Restoration ribaldy that took place in England at the turn of the century followed much the same pattern as society has in its "reaction" today. The governmental control of the excesses of the individual was not through the licensing acts which were allowed to lapse in 1695 but rather through the Common Law, which held each citizen accountable for personal conduct which affected public morals.

In the early 1700's "the reputable literature of the time was often very broad, and pornographic works cir-

culated freely."[21] "In London, where various trades and businesses tend to flock together, the pornographic shops were mostly on Holywell Street. . . . It is not known who first had the notion that publication of obscenity might be a violation of the English Common Law. But in 1708 he managed to have a printer named Reid called before a grand jury for producing a pornographic book entitled 'The Fifteen Plagues of a Maidenhead' . . . it was a typical example of the new commercial smut."[22] The first reported obscenity conviction, in *Regina v. Reid* (1708), 11 Mod. Rep. 142, came before Judge Sir John Holt who ruled that nothing in the law, common or statute, could warrant an indictment against even the filthiest book. He wished there were, but he could not make law. And so Mr. Reid went free.

The Common Law, however, was and is a living thing and it breathed new life for the community when the case of Edmund Curl came before the courts in 1725. The book for which Curl was arrested, "Venus in the Cloister, or the Nun in her Smock," had been in print for 50 years or more The magistrate convicted Curl. This time, on appeal, the prosecutor argued[23] that to corrupt the morals of the king's sub-

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[21]Suppressed books. Alec Craig. Copyright 1963 by The World Publishing Co. at page 33.

[22]The Erotic in Literature, David Loth, a MacFadden Book, 1961, at page 104.

[23]"3. As to morality. Destroying that is destroying the peace of the Government, for government is no more than publick order, which is morality. My Lord Chief Justice Hale used to say Christianity is part of the law, and why not morality too? I do not insist that every immoral act is indictable, such as telling a lie, or the like; but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offence of a publick nature. And upon this distinction it is, that particular acts of fornication are not punishable in the Temporal Courts, and bawdy-houses are. In *Sir Charles Sedley's*

jects was an offense at Common Law. *If you destroy morality, you destroyed the peace of government.* In upholding the conviction, the King's Bench established for the first time the crime of obscene libel as a misdemeanor. *Rex v. Curl* (1727), 2 Strange 788. The state and the law out of necessity had forged a tool ready to meet the community's need at that time for controls against obscene material.

It was no accident therefore that Cleland, 22 years later, found himself in difficulty when his "Fanny Hill", published anonymously,[24] appeared on the market in 1749. In "Copies Taken From the Records" is found under date of November 8, 1749, a warrant for the seizure of "a most obscene and infamous book entitled The Memoirs of a Woman of Pleasure."

George Ryley Scott gives this account in his book, "Into Whose Hand" at page 143:

> "When Cleland was summoned before the Privy Council for writing an obscene book and pleaded poverty as an excuse, the Earl of Granville, who, at the time, was president of the Council, granted him a pension of 100 pounds a year on condition that he did not write any more literature of this type."

Ralph Griffiths, Cleland's publisher, was the first smut peddler to make a fortune in the trade, and he did it on "Fanny Hill". It is also noted that the first criminal penalty in the over 214 years of suppression of "Fanny

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case it was said, that this Court is the custos morum of the King's subjects. 1 Sid. 168." . . . *Rex v. Curl*, 2 Strange 789, at 790.

[24] "'Printed for G. Fenton in the Strand' but of Fenton nothing else is known—almost certainly he did not exist. . . ." Fanny Hill, Putnam edition 5555, 1963, Introduction, page VII.

Hill" which followed, was suffered by one Drybutter, a distributor of "Fanny Hill", who in 1757 was sentenced to the pillory.[25]

Today, in the shadow of this history and at a time when this nation is visited with problems[26] that parallel those which existed in England in 1749, appellant appears in this High Court with his argument that the concern of government and the courts of justice in Massachusetts over the corrosive effects which weigh against the people's sense of sexual morality do not transcend his personal right to publish for profit. We ask this Court to take its guidance from the Common Law principles.

C. Intervenor and Other "Fanny Hill" Publishers Have "Cleland" Attitudes.

Nor is appellant alone in this court room. With him today as real parties in interest though not named, are the ghosts of other contemporary publishers who enjoy in common, lesser reputations than that of this publisher. All, however, are joined in their endeavor to capitalize commercially on the erotic qualities of "Fanny Hill."

Lest this Court misconceive the nature of the inquiry, by virtue of the appearance here of a "Fanny Hill" publisher under the disguise of an "old line publishing company," it must be emphasized that their move into the production of erotic literature was not without calculation. Appellant's recent publications of "Candy,"

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[25]Fanny Hill, Putnam edition 5555, 1963, Introduction, page VIII.

[26]In comparison, the obscenity problem in the United States is infinitely greater than that which existed in England in the 1700's due to the modern advancements of the high speed press, rapid transportation, ease of access to channels of distribution, easy credit, availability of the purchasing dollar, etc.

"Krafft-Ebbings Psychopathia Sexualis", "Perfume Garden", and "Ananga Ranga", place it alongside a formidable array of nondescript publishers who, for commercial profit, are bent upon pushing back the line between candor and shame beyond that which is acceptable to the community. Their interest is not centered on free speech, but rather in their commercial interests in profit arising out of copyright interest, and the historic saleability of pornographic material.

In *Putnam & Sons v. Lancer Books, Inc.,* 239 F. Supp. 782, appellant brought suit against Lancer Books and others for "pirating" their rights to a monopoly on "Candy",[27] a piece written for French pornographer Girodias in 1958. In the Illinois trial of Putnam's Son's "Fanny Hill", *Illinois v. Paul Romaine,* the defense attorney clarified the testimony of Mr. Walter Minton, president of Putnam & Sons, as to the circumstances surrounding Putnam's publication of "Krafft-Ebbings Psychopathia Sexualis". A rival publisher, Greenleaf Publishing Company,[28] had "beaten" them

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[27]Putnam & Sons, Lancer, Brandon House, All Star, Greenleaf Classics, Sundown Readers, and Ampoc published "Candy."

[28]More recently the same publisher, Greenleaf Publishing Company, has been found guilty of copyright infringement in a New York Federal District Court. Judge John R. Bartels held they pirated the translation of French author M. Genet's "Thief's Journal" from Grove Press. Also named as defendants in the Grove Press suit were William L. Hamling and Frances Hamling, Greenleaf Publishing Company owners, New Cal Publication Inc. of Gardena, California, and Reed Enterprises, Inc. of San Diego, its national distributor, also indicated in Houston, Tex., on September 11, 1965, for publishing Nightstand Books "Orgy Club," "Sin Summer," "Shame Hunger," "Temple of Shame," "Virgin Inc.," "Passion Carousel," and "Swap Sect.' Greenleaf Publishing Company was taken to task this Spring by a reviewer writing in the Books Section of Women's Wear Daily. The reviewer wrote that Grove Press, publisher of Miller's novels had just "learned to its horror" that a private publisher, an adjunct of a girlie magazine called Rogue, was ready to distribute a

to the publication. "I know it was Putnam's intention to be the first on the stand with this but when it was announced that Putnam's was going to bring out an edition of Krafft-Ebbings, Putnam's original intention was to bring out a hard cover edition . . . then, I believe Greenleaf had its own translation made . . . and Greenleaf got on the stand after this was printed but before it was published . . . and Greenleaf was the first unexpurgated edition out on the stand."

The Putnam & Sons edition of "Fanny Hill" which received court attention in New York, New Jersey, Illinois and Massachusetts is not the only "Fanny Hill" edition on the open market today, which will be affected by this Court's ruling.[29] In truth, the people's cause for decency in community standards is more in danger from the manner in which this case will affect those publishers and their other products.

Typical of the publishers of "Fanny Hill" which preceded Putnam & Sons, was the fly-by-night publisher Richard J. Haddad, *California v. Haddad, Forti* (Los Angeles Superior Court Case 27504, unreported). See also *Haddad et al. v. Superior Court of Los Angeles County,* 32 Cal. Rptr. 120 (July 10, 1963). Haddad manufactured materials in three classifications: sado-masochistic material like "Bound in Rubber", "Female Sultan", "Whip and Lash", "Bondage Slave", and "Bondage Discipline at Bondhaven". A step lower, he reproduced such paperback gems as "Rape Me Again", "Incest for Renee", and "Sex Life of a Cop". At the

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2-volume paperback edition of Miller's novel, "Sexus." The reviewer added that Grove Press, which had planned to publish "Sexus," immediately issued a 1-volume paperback edition of the work, priced at 65c less than the Greenleaf edition.

[29]See note 30.

bottom of the rung were the paperbacks, "Devil's Advocate", "Head Humper", "Down She Goes", "Venus in India", "Memoirs of Josephine Mitzerbacker", "Three Times a Woman Gruschenka", and "Memoirs of Fanny Hill". The manuscripts from which Haddad worked had a "French import" look and were graphically illustrated. His publishing operations consisted of deleting the photographic illustrations, renumbering the manuscript pages, and reproducing the same by lithography. He had completed "Down She Goes", "Head Humper", and "Devil's Advocate", and was about to reproduce "Fanny Hill" when on November 30, 1962, the Los Angeles County Sheriff's Vice ended his operation. A Los Angeles jury in January 1964 found Haddad and Forti guilty of conspiracy to print, publish, etc. obscene materials in *California v. Haddad, Forti* (S.C. 27504).

The number of persons who preceded Haddad as publishers of "Fanny Hill" belong to a legion of the unknown. Those who were successful would not risk their trademarks on their product. The unsuccessful who ran athwart the law, rarely ventured beyond the state of pleading "guilty", in recognition of the astronomical odds which ran against them in the trial court. Hence, the appellate courts do not record their names. The intervening two centuries since 1749 are crowded with people who longed for the anonymousness which appellant and others now consider demeaning to their product.

Some (but not all) of the "Fanny Hill" competitors of G. P. Putnam & Sons are: Brandon House (P. 901),[30] owned by Milton Luros of 7311 Fulton Street,

[30]On February 14, 1964, the Attorney General of the State of Rhode Island filed an *in rem* civil action against "Fanny Hill,

Los Angeles, California, also a publisher of girlie magazines, nudist magazines and sex (predominantly lesbian type) paperbacks; All Star (AS 10), owned by Edwin A. Schnepf of 10539 Burbank Blvd., Los Angeles, California, also a publisher of girlie magazines, nudist magazines, sex tabloids and sex paperback books, and Fitz Publishing Company, Los Angeles, California, distributed nationally by Golden State News (GSN) owned by a publisher and distributor of girlie magazines, nudist magazines and sex paperback books.

It was no coincidence that in October 1963, concurrently with the California decision holding "Tropic of Cancer" not obscene,[31] a paperback book entitled

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Memoirs of a Woman of Pleasure" published by Brandon House (American Art Agency Inc., dba Brandon House) of 7311 Fulton Avenue, North Hollywood, Calif. On February 27, 1964, Judge John E. Mullen of the Providence Plantation Superior Court made a written finding that "there is reasonable cause to believe said book is obscene," and issued a temporary restraining order. American Art Agency, Inc., a California corporation, made a special appearance on March 17, 1964, and filed a stipulation continuing the temporary restraining order in effect, under which, time for filing special pleas was extended to May 25, 1964. No answer was filed until January 19, 1965, when publisher's attorney filed two answers: one for American Art Agency, Inc., the California corporation, denying the book is obscene, and the other for other respondents, denying the book is obscene and challenging the provisions of the statute (failure to provide for a jury trial, failure to set a standard for obscenity, challenging the provision which allows the court to except from its judgment a restrictive category of persons to whom the book may be sold or commercially distributed, challenging "County" standards, etc.). *J. Joseph Nugent, Attorney General of Rhode Island v. Fanny Hill* (Providence Plantations Supreme Ct. M.P. 6467). The Brandon House edition was being distributed by Books Inc. of Providence, a recognized distributor of sex materials. On December 17, 1964, a federal jury found Books Inc. guilty of the interstate shipment of an obscene paperback, "Lust Job," in violation of 18 U.S.C.A. 1462.

[31]On July 2, 1963, the California Supreme Court entered its judgement in *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152, holding Tropic of Cancer "not obscene" in a declaratory judgment action and reversing a contrary decision in the trial court

"Fanny Hill", published by Brandon House of 7311 Fulton Avenue, North Hollywood, California, appeared on the newsstands in Los Angeles and throughout the nation. At about the same time, the paperback edition of Putnam & Sons also appeared. When asked as to why the book was being sold, one newsdealer replied: "We have been selling it ever since 'Tropic of Cancer' has been put back on the racks."

A short time later, in January 1964, a paperback book entitled "Fanny Hill" (AS 10), published by All Star Books of 10539 Burbank Blvd., North Hollywood, California, appeared on the newstands in Los Angeles and throughout the nation.

Much later in 1965, following the dismissal by the Los Angeles District Attorney's office of an action against All Star's "Fanny Hill" (*infra*), another paperback edition of "Fanny Hill" published by Fitz Publishing Company of Los Angeles, California, and distributed nationally through Golden State News (GSN) appeared on all newsstands.

On April 21, 1964, the Los Angeles County Grand Jury returned felony indictments against 14 persons for conspiracy to print, publish, etc., "Fanny Hill" and eight other paperback books in violation of the California obscenity laws in *California v. Schnepf, et al.*, SC 289205. The books named in the indictment were: "Beds of Canyon Grove" (AS 3), "Sin Island" (AS 4), "Wild Women of Wolf River" (AS 5), "Women

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and in the District Court of Appeal. On July 31, 1963, a petition for rehearing was denied. On October 26, 1963, the City Attorney of Los Angeles filed a petition for certiorari, which was denied, in *Zeitlin v. Arnebergh*, 375 U.S. 957 (Dec. 16, 1965).

of Beaver Mountain" (AS 6), "Girls in the High Spike Heels" (AS 7), "Suburban Sex Pots" (AS 8), "Route 69" (AS 9), "The Love Teacher" (AS 11), and "Fanny Hill" (AS 10). Motions to dismiss the Schnepf indictments were denied in the Los Angeles Superior Court. A writ of prohibition was denied by the District Court of Appeal, 2nd Appellate District, and a petition for a hearing was denied in the California Supreme Court.

The All Star "Fanny Hill" (AS 10) did not go to trial in the *Schnepf* case, however. In March 1965 a new District Attorney struck "Fanny Hill" from the indictment, conceding without trial, that the same was not obscene. The Los Angeles jury in hearing the case on the five books which were submitted to them, found them all to be obscene. All Star reprinted "Fanny Hill" after the jury verdict was rendered on the other books and the indictment as to "Fanny Hill" was dismissed.

On October 21, 1964, the Los Angeles County Grand Jury returned felony indictments against 15 persons for conspiracy to print, publish, etc., obscene matter in violation of the California obscenity laws in *California v. Milton Luros, et al.*, SC 295183. Count 2 of the indictment included "Fanny Hill" and 8 other paperbacks, "Lesbian Sin Song" (P. 606), "Two Women in Love" (P. 619), "Counterfeit Lesbian" (P. 623), "Lesbian Captive" (P. 624), "Lesbians in White" (P. 627), "The Girls at Wendy's" (P. 707), 'The Three Way Apartment" (P. 710), "Honey Lips" (P. 713), and "Fanny Hill" (P. 901).

The Brandon House "Fanny Hill" (P. 901) did not go to trial in the *Luros* case, either. Two months after the indictments were returned, the new District Attorney similarly voluntarily struck "Fanny Hill" from

the indictments, conceding that the same was not obscene.

D. The Reason for This Nation's Obscenity Laws.

Curl's case arose out of the people's reaction to the sexual excesses and the libertine life of the Reformation Period. Destroying morality was destroying the peace of the government, for government is no more than public order, which is morality. *Rex v. Curl (supra)*. Obscene libel was declared to be a common law misdemeanor, and this in turn has become a fundamental part of the law of the states which make up this union, either through the common law, *Commonwealth v. Sharpless* (1815), 2 S and R 91, 7 Am. Dec. 632, or by statutory proscription, *Roth-Alberts* (*supra*). To deny its reasonableness is to disregard our inheritance.

Several hundred years ago, one of Cleland's contemporaries (though not of his philosophy) wrote in simple verse the clearest statement of "why" government acts to outlaw obscenity. In 1705, Alexander Pope wrote in his quatrain on "The Monster Vice":[32]

> Vice is a monster of so frightful mien
> As to be hated, only needed to be seen.
> Yet seen too oft, familiar with her face,
> We first endure, then pity, then embrace.

The function of the obscenity laws is not, as is so often suggested by those opposed to such laws, the eradication of that social evil which *directly* causes anti-social conduct.[33] Nor even that social evil which "probably" or "possibly" is the cause of such anti-social con-

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[32]We think it applies to 'Tropic of Cancer." See *Besig v. U.S.*, 206 F. 2d 142, 147 at footnote 5.

[33]*Roth-Alberts*, 354 U.S. 476, 486.

duct. Neither does it concern itself primarily with the danger that children may come into contact with the material.[34] Rather the law's concern is with the more generally accepted historical notion,[35] that a society in which obscene material is readily available for its members is not a healthy society and is heading downhill.

A nation which is preoccupied with sex is thought to be "sick." The ultimate evil would be a society in which sex pictures, novels, and magazines, are available at every store, sex pictures on every marquee, sex movies in every theater, sex pictures in every art gallery and sex language in every dialogue. To the extent that we approach this status by degrees, we recognize we are losing control of public order and we are closing the gap on the community of "Sodom and Gomorrah." The anti-social conduct of today's society becomes the socially acceptable conduct of the new community.

Louis B. Schwartz, co-reporter of the Model Penal Code explains the governmental function of the obscenity crime in society as follows:[36]

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[34]But see *Jacobellis v. Ohio* (Opinion of Justice Brennan, concurred in by Justice Goldberg), 378 U.S. 184, 84 S. Ct. 1676, 1682, 12 L. Ed. 2d 793.

[35]The existence of obscenity is the symptom of a disorder which probability teaches us, will lead to ruin. Arnold Toynbee, the historian, tells us that 19 of the 21 great civilizations which flourished in world history, crumbled into ruin—not because of armed aggression from without, but because of moral decay from within.

In sum, the case for the governmental action taken by the State of Massachusetts was stated by U.S. Supreme Court Justice Harlan in his concurring opinion in *Roth-Alberts* (*supra*) at page 502:

> "The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. . . ."

[36]Columbia Law Review, Morals Offenses and The Model Penal Code, Louis B. Schwartz, at 671, 672, 681.

". . . the great majority of people believe that the morals of 'bad' people do, at least in the long run, threaten the security of the 'good' people. . . . It is hard to deny people the right to legislate on the basis of their beliefs not demonstrably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a credo and its associated sensitivities, however irrational, in deference to a minority's skepticism."

"If unanimity of strongly held moral views is approached in a community, the rebel puts himself, as it were, outside the society when he arranges himself against those views . . . the community cannot be expected to make (his) first protests respectable or even tolerated by the law. . . ."[37]

". . . But equally, it is not merely sin-control of the sort that evoked Professor Henkin's constitutional doubts. Instead, the community is merely saying: 'Sin, if you must, in private. Do not flaunt your immoralities where they will grieve and shock others. If we do not impose our morals upon you,

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[37]The gravest amount of harm is being accomplished by a misapplication of the majority opinion in *Kingsley International Pictures, Inc. v. Regents*, 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 (1959) in this area. See Justice Brennan's Opinion in *Jacobellis v. Ohio*, 84 S. Ct. 1676 at 1680. Perversions like incest are being presented in the voyeur manner of Fanny Hill's Peeping Tom incident in the inn, under the argument that such is speech in the form of "controversial sex talk." Subject matter whose sole advocacy is deviation from accepted sexual norms, which by its unorthodoxy and manner of presentation is prurient in nature to the "average" person in the community *is* proscribed by the obscenity laws, and this Court should make that point clear to undermine the possibility of arguments from *Kingsley International Pictures, Inc.* (*supra*) to the contrary.

> neither must you impose yours upon us, undermining the restraints we seek to cultivate through family, church, and school.' *The interest being protected is* not, directly or indirectly, the souls of those who might be depraved or corrupted by the obscenity, but *the right of parents to shape the moral notions of their children, and the right of the general public not to be subjected to violent psychological affront.*" (Our emphasis.)

We contend that strong obscenity law enforcement can assist in reversing the trend in the type of anti-social sexual misconduct, which is widespread in the nation today. Certainly the history in Cleland's time bears this out. Alec Craig writes:[88]

> "Before the end of the eighteenth century an astonishing change had come over English literature. From being as outspoken as any other it had become so straitlaced as to be a historical curiosity. . . ."

The change in the Common Law Court's attitude to the obscenity laws had its effect on private writings and most likely, the social conduct of the community,[89] tho indirectly, for the standards in the community did change thereafter from the previous sexual excesses, which had previously existed.

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[88]Suppressed Books, Alec Craig, copyright 1963 by The World Publishing Co. at page 35.

[89]We have witnessed the reverse of this in the United States in recent years. A weak attitude on the part of the courts toward obscenity law enforcement has been accompanied by a proportionate increase in anti-social sexual behavior.

E. "Fanny Hill" is Obscene.

1. The Roth-Alberts Standards.

(a) *General.*

The majority opinion in *Roth-Alberts* (*supra*) approved three definitions of the word "obscene" as being within the constitutional standard, which itself was set forth in a fourth test.

The federal court sponsored test in *Roth* and the State Court sponsored test in *Alberts* were set forth at page 486:

> "In *Roth,* the trial judge instructed the jury: 'The words obscene, lewd and lascivious as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts.*' (Emphasis added.) In *Alberts,* the trial judge applied the test laid down in *People v. Wepplo,* 78 Cal. App. 2d Supp. 959, 178 P. 2d 853, namely, whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires.' "

The court thereafter held both tests to be within the constitutional standard, when given with proper jury instructions relevant to the dominant theme and proper audience.

The majority opinion gave approval to the definition found in the A.L.I. Model Penal Code, Section 207.10-(2) (Tentative Draft 1957) and noted no significant difference between this and the meaning of obscenity developed in the case law at page 486, footnote 20:

> ". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest,

> i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters . . . See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*"

Justice Brennan expressed the constitutional standard in a fourth definition, in these words at page 489:

> "Some American courts adopted this standard but later decisions have rejected it and substituted this test: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. . . ."

The most recent separate pronouncements of the majority of the individual justices of this Court in *Jacobellis v. Ohio* (*supra*) have indicated no intention to depart from the express holdings of the *Roth* case. Jacobellis was a no clear majority decision (See Argument IC). There was no opinion of the court.

Justice Brennan expressed his reaffirmance, concurred in by Justice Goldberg, at page 1680:

> "Recognizing that the test for obscenity there . . . is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard. . . ."

Chief Justice Warren, with whom Justice Clark joined, said at page 1685:

> "In light of the foregoing, I would reiterate my acceptance of the rule of the Roth case. . . ."

Justice Harlan adhered to his view of separate tests for state and federal cases, as amplified in his opinion in *Manual Enterprises, Inc. v. Day (supra).*[40] Justice Harlan said at page 1686:

> "As to the States, I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat sex in a fundamentally offensive manner, under rationally established criteria for judging such materials. . . ."

Justice White concurred in the judgment and did not indicate his views, but voted with Justices Warren, Clark and Harlan to deny certiorari in *Grove Press, Inc. v. Gerstein* (*supra*) and *Tralins v. Gerstein* (*supra*).

(b) *Prurient Interest" Is Proscribed.*

Appellants claim that *Roth-Alberts* established three independent tests: prurient interest, patent offensiveness and social value, is without merit. There is a *unity of purpose* in the obscenity statutes, which is to separate and proscribe material whose dominant theme is to prurient interest (sexual expression which is unacceptable to community standards) from the non-prurient material (sexual expression which is acceptable).[41] "Patent offensiveness" is not a part of the *Roth* test. Only

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[40]In *Roth*, Harlan's test was "hard-core pornography." In *Manual Enterprises, Inc.*, at 489, it was "amended" to "patent offensiveness."

[41]*Curl's* case. See Argument II D.

in Justice Harlan's view is this term employed, and then only in Federal cases. "Social value" has importance, but only in so far as it relates to the dominant theme inquiry. Here we have a "Balancing Concept." Is the dominant theme to prurient interest or is the prurient interest submerged in a theme which has social importance? A.L.I. Model Penal Code (1957 draft), Section 207.10 Reporter's Comments.

In our view, most of the confusion arising in the *Roth* test flows from a failure to understand the true nature of "prurient interest". This concept is described with clarity in the reporter's comments to the Model Penal Code:[42]

> "The proposed definition recognizes that there is a *normal* interest in sexual matters, for which it should be lawful to provide satisfaction through works of art as well as scientific and educational writings. . . ." (In contrast) ". . . The prurient interest is an *exascerbated*" (irritating), "morbid, or perverted interest growing out of the conflict between the universal sexual drive of the individual and equally universal social controls of sexual activity. . . ." (Our emphasis.)

The code itself describes the prurient interest as a "shameful interest." Contrary to the popular belief of some, there is no such thing as material whose dominant theme is to "prurient interest" which is "acceptable to contemporary community standards. The terms are mutually exclusive. It is either a prurient interest (unacceptable to standards) or a normal interest (acceptable).

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[42]A.L.I. Model Penal Code, 1957 draft, section 207.10, comments at p. 29.

"Prurient interest" is defined by the existing social norms which are acceptable to the community as standards of conduct. The line between non-pruriency and pruriency is the *narrow* line between candor and shame.[43] How candid may sexual expression be, before it becomes shameful and a danger to the approved standards, which the obscenity laws are designed to protect? We encounter constitutional difficulties because, by its nature, "prurient interest" is defined in fluctuating terms, the line of which, when approached, has a tendency to inhibit expression.

In recognition of the social importance of legitimate expression, which the First Amendment safeguards, the organic law must allow a sufficient leeway in the area of the line, so as not to silence worthwhile expression which might be stifled out of fear of coming too close to the line. This is why a jury[44] and the criminal forum is so ideal in resolving such an issue. When government requires that 12 persons selected in accordance with due

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[43] *United States v. Kennedy*, 209 Fed. 119, 121 (1913); *Volanski v. United States*, 246 F. 2d 842, 845 (1957).

[44] "It would seem that a jury should in each case establish the standard much as they do in cases of negligence." *United States v. Kennerley*, 209 Fed. 119, 121.

"We impose such a duty upon a jury, because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfied the moral demands of a community. . . ." *United States v. Levine*, 83 F. 2d 156, 157 (1936).

"The question in our opinion is peculiarly one best left for *nisi prius* determination, perferably by a jury . . ." *Volanski v. United States*, 246 F. 2d 842, 845 (1957).

"The jury represents a cross-section of the community and has a special attitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards." *Kingsley Book, Inc. v. Brown* (*supra*) (Justice Brennan, dissenting.)

process must agree unanimously, and that each one of the 12 must be convinced "beyond a reasonable doubt" that the dominant appeal is to "prurient interest", (not normal, not acceptable to community standards), then there is little danger that legitimate expression, which the First Amendment was designed to protect, will be violated. Appellate courts can be satisfied that the result is sufficiently over the line. This same general safeguard as to criminal penalties is provided in the Model Penal Code requirement that the material must go "substantially beyond customary limits of candor."

(c) *Slight Social Importance Does Not Exculpate.*

Appellant's argument is that the predominant appeal of "Fanny Hill" may be to prurient interest, but if it has any social value, then he has a constitutional right to publish it[45] against the express wishes of the community as reflected in the judgment of its highest tribunal.[46] This interpretation completely disregards *Curl's* case and the reasoning behind obscenity legislation.[47] It flies in the face of previous case law, as reflected in the A.L.I. Model Penal Code (1957 draft), Section 207.10 and reporter's comments thereto.

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[45]"It is the Publisher's position that a book must fail by all of these tests before it may be suppressed. If, in applying any one of them, the result is on the side of free expression, suppression is impermissible." (Jurisdictional Statement, page 15) . . . "Nor is it every publication considered prurient that the statutes can affect; it must be a publication 'utterly without redeeming social importance.' For unless the publication is worthless trash, it is not possible to justify its suppression in the face of a constitution that forbids abridgement of freedom of the press." (Jurisdictional Statement, page 25.)

[46]"Where a work of any value is in issue, the fact that most of the citizenry views it as immoral or offensive cannot justify a forcible silencing." (Jurisdictional Statement, page 26.)

[47]See Argument II D, *supra.*

The very language of the Chaplinsky Court, as approved in *Roth* indicates that speech may have "slight social value" and yet be subject to punishment, because by its nature it is obscene:

> "It has been well observed that *such utterances are . . . of such slight social value* as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." (Our emphasis).

The primary inquiry is,

> "What is the predominant appeal of the subject matter as appraised by the average person, in the light of contemporary standards? Are the elements of prurient interest subordinate to other positive values?"

In this regard the reporter for the Model Penal Code states at page 30:

> "The second aspect of the recommended definition requiring that appeal to prurient interest be the *predominant* appeal of the material, recognizes that a work of art or literature may contain elements of prurient interest, which, however, are subordinate to other positive values of the work. Policy as well as constitutional limitations enjoin us to safeguard freedom of expression by *balancing artistic or other merits of a work against the alleged prurient appeal.* . . ." (Our emphasis).

and at page 40:

> "11. *Effect of Artistic or Scientific Merit.* The effect of our proposals on definition of the obscene, consideration of the work 'as a whole,' and admissibility of evidence of artistic and other mer-

its is to permit consideration of positive values of the work in determining whether the predominant appeal of the work is to prurient interest. This does not differ substantially from present law."

and at page 42:

"Our reasons for hesitating to relate the definition of obscenity directly to appraisal of artistic merit are as follows. In the first place, great artistry is not necessarily inconsistent with prurient appeal; consummate skill in execution might be the very thing which lends the work its powerful erotic appeal. . . .

"Accordingly, we have refrained from making artistic or other merit a direct and independent issue in obscenity trials. On the other hand, it is obvious that the issue of 'predominant appeal" involves not only a judgment that the material in question appeals to prurient interest, but also a judgment that it has this characteristic more than any other. Thus consideration is invited to the question of what other appeal, if any, the material has. And in subsection (2) (c) we expressly provide for the admissibility of evidence as to artistic, literary, scientific, educational or other merits.

"The slight but real difference between a defense or justification on the basis of artistic worth and mere permission to introduce evidence of artistic merit as bearing on the issue of 'predominant appeal' may be seen in the possibility, under the later arrangement, of (1) convicting notwithstanding great artistic competence, where the main appeal is to prurient interest; and (2) acquitting notwithstanding that the material has little or no artistic

merit and some, but not much, appeal to prurient interest, in short, is a dull piece with no significant 'appeal', where a trace of the salacious is lost in a sea of inanity.

"The ultimate question is how prominent is the appeal to prurient interest in the work as a whole, whatever the value judgment placed on the balance of the work." (Our emphasis.)

The cases cited by appellant in support of a contrary position at page 15 of his jurisdictional statement relate to the "Tropic of Cancer" decisions in various state tribunals. *Grove Press, Inc. v. Gerstein (supra)*[48] should not be interpreted as changing the "Balancing Rule" expressed above in the Model Penal Code, for this Court has indicated it is following "prior case law" and the A.L.I. M.P.C. See *Roth-Alberts* (*supra*) at page 487, footnote 20:

"We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code. . . ."

There is no indication from *Jacobellis* (*supra*) that the "balancing test" has been abandoned. That was a no clear majority decision. There was no opinion of the court.

(d) *Grove Press Inc. v. Gerstein Should Be Abandoned.*

On June 22, 1964, this Court granted certiorari in *Grove Press Inc. v. Gerstein,* 378 U.S. 577, 84 S. Ct.

[48]We believe that subsequent developments have proven the result as to "Tropic of Cancer" reached by this Court in *Grove Press, Inc. v. Gerstein* (*supra*) should be abandoned. (See Argument II(E)(d) *infra.*)

1909, 12 L. Ed. 2d 1035 and, without argument, reversed the Florida judgment which had held "Tropic of Cancer" obscene under Florida's obscenity laws. The adverse effect of that case on law enforcement on the one hand, and its encouragement to the purveyors of obscenity on the other, observed during the intervening 18 months, recommends the result there reached as a most dangerous "precedent," in so far as the morals of this country are concerned. In these troubled times, the "trade", law enforcement agencies and a substantial number of courts have interpreted the decision as meaning "Anything goes." It has proven to be an open solicitation for the publication of even greater obscenity.

No other case has given greater scandal in this nation's battle against obscenity. State and Federal Courts are proceeding without direction. See Argument ID, "A Major National Problem."

The Illinois Supreme Court interpreted the decision to require it to abandon the "balancing test" of *American Civil Liberties Union v. City of Chicago,* 3 Ill. 2d 334, 121 N.E. 2d 585 which it had previously employed in obscenity cases. They reversed the jury conviction of Lenny Bruce, but not before they noted:

> ". . . we would not have thought that constitutional guarantees necessitate the subjection of society to the gradual deterioration of its moral fabric which this type of presentation promotes. . . ."

Trial Judge Sprankle, in refusing to permit a felony indictment against a major manufacturer of lesbian type paperback books to go to a jury, said as to each of the eight books involved: "This book does not treat sex

in a more shameful manner than does Tropic of Cancer or Fanny Hill" "There is absent the customary 'obscene' words so common in 'Tropic of Cancer.' This book does not even approach 'Tropic of Cancer' in candor and description or representation of the sexual matters referred to."[49]

Another trial judge, in Kansas in July 1965 held 11 Nightstand Type books to be not obscene, with this reasoning:[50]

> "The book 'Tropic of Cancer' goes far beyond the books in question, containing virtually every filthy word in our language and portrays sexual activity in the most graphic detail. *When this book has been held by the Supreme Court of the United States to be constitutionally protected, this court cannot condemn the books named in the information as obscene."* (our emphasis).

Publishers of sub-literature similarly have interpreted the Grove Press Inc. result, as "Anything Goes," as is born out by the eruption of new pornography which followed.

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[49]See Argument ID. We submit that the trial judge's manner of reasoning, "deduction through comparison with an approved (but false) standard," when applied to the community and its reaction to undisturbed obscenity, is a real danger to this nation's moral standards. One is led to reason "what is wrong with a sex orgy, if its manifestations are everywhere about and tolerated?"

[50]*Kansas ex rel. Londesholm v. A Quantity of Copies of Obscene Books,* Titled "Sin Hooked," Bayou Sinner," "Lust Hungry," "Shame Shop," "Fleshpot," "Sinner's Seance," "Passion Priestess," "Penthouse Pagans," "Shame Market," Sin Warden," "Flesh Avenger" No. C-3595-64, unreported, Judge Tom Raum of the District Court of Sedgwick County, Kansas.

When in December 1963 this Court denied certiorari in *Zeitlin v. Arnebergh* (*supra*), affirming the decision that "Tropic of Cancer" was not obscene in California, a lone proprietor, doing business in Los Angeles as Tempo Publishing Company, brought out a new line of books. His 1964 requirements for "Boudoir Classics" were described in his form letter to prospective authors:

"Dear Mr. .....:

"With reference to your mms which we have returned, I am sending you the following letter outlining precisely our needs. Your mms was not even remotely geared to these needs, nor was it the required 40,000 words.

"We need tough, strong, hard-hitting, sex-action-filled books, geared to the demands of today's and tomorrow's market—rather than to the standards of even a few months ago.

"What we basically seek is off-beat sex, with an emphasis on deviations. Some possible themes to write by: foot wear lined and rubber clothing, ultra high heels, whipping, gagging, female dominance, gloves, sex rituals, transvestia, sadism, masochism, homosexuality, phallic symbols, buttocks, inter-racial affairs (oriental, african, indian), boots and shoes, corsets and tight lacing, spanking, tying, girls fighting, wet clothing, masks, wife swapping, lesbianism, exotic lingerie, group orgies, voyeurism, aphrodisiacs, fettishes.

"Plot is secondary. We do not want complicated plots, naive sex adventure stories 'spiced' with sex —nor pages of rambling, pointless dialogue. I need more descriptions and more character per book. Naturally, I expect the descriptions of these various things to be in good taste. The mere fact that some of these themes are used will sell our books.

"Mss for this line, if acceptable, will run up to $600, or more if necessary, with a small token payment of approximately $100, after approval and final acceptance, and the balance after publication.

"Perhaps the above will explain the unacceptability of your mms and guide your future efforts for submissions to us.

"Thank you for your interest."

The response to this form letter hit the target and produced the following titles: Lesbian Love" (B0001); "Oversexed" (B0002); "Lash of Lust" (B0003); "Lesbian Sorority" (B0004); "Lust in Leather" (B0005); "Whipped Passions" (B0006); "Perversion Resort" (B0007); "Club Unique" (B0008); "Lady Stud" (B0009); "Beyond Lust" (B0010); "Couple for Hire" (B0011); and "Sexurbia" (B0012).

Following the Grove Press reversal, other "teams" met the increased competition with other lines like "Exotik Books" which came out on the markets in late 1964, and "Satan Press" which appeared in early 1965. In a period of approximately 8 months, an esti-

mated 25,000 copies of each of the following titles appeared:

EXOTIK BOOKS

Killer Dyke (W-3)
House of Perversion (W-4)
Stud Ship (W-5)
Sex Swap (W-6)
Passion Pills (W-7)
The Rape Club (W-8)
Sex Farm (W-9)
The Gay Game (W-10)
Seed of the Beast (W-11)
Sex Fever (W-12)
Portraits of Pleasure (W-13)
Joy House (W-14)
Sexational Stepdaughter (W-15)
Love's Lash (W-16)
Motel 69 (W-17)
Strange Bondage (W-18)
Nightmare in Leather (W-19)

SATAN PRESS

Queer Daddy (101)
Passion Psycho (102)
Denied (103)
The Seeker (104)
Teacher's Pet (105)
Celluloid Sex Bomb (106)
Black Water Nympho (107)
His Brother Love (108)
Passion Sauce (109)
The Experimentors (110)
Just for Kicks (111)
Sex Challenge (112)
The Sex Trap (113)
Everybody Wins (114)
30 Day Orgy (115)
Whatever Wanda Wants (116)

The general theme of these books covered fetishism and perversion (see, Lust in Leather); sexual relations between women and dogs (see, Passion Psycho and Seed of the Beat); Incest between father, mother, brothers and sisters (Queer Daddy, Celluloid Sex Bomb, Sexational Stepdaughter and Strange Bondage) and the like.

We submit that the progeny of "Tropic of Cancer" have proved it to be a dangerous precedent from the standpoint of this nation's morals. (See Argument II D).

We believe the overwhelming majority of the people in this nation disagree with the view that holds "Tropic

of Cancer" acceptable to this nation's standards.[51] and outside the proscription of *Curl's* case (*supra*). It is a rule of law not easily understood which holds that "obscenity is suppressible but well-written obscenity is not."[52] This Court requires decency in expression from lawyers who present ideas before it. The penalty is severe:

> "40.5 Briefs must be . . . free from . . . scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court."
>
> Revised Rules of the Supreme Court of the United States.

It would appear that the communities throughout this nation should have the same degree of control over ar-

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[51]"The jury . . . has a special aptitude for reflecting the view of the average person. *Kingsley Book Inc. v. Brown* (*supra*) Justice Brennan, dissenting. Of the seven juries which considered "Tropic of Cancer," not one jury cleared the book. In four criminal trials, the defendant was convicted. *People v. Fritch* (New York), *Yudkin v. Maryland* (Maryland), *People v. Cuffel* (Indiana) and *People v. Bradley Smith* (California). In the civil suit, *Grove Press Inc. v. Gerstein,* the book was found obscene. The closest the book has come to winning honors was in *People v. Pershina* (Marin County, Calif.) in which the book seller was acquitted, reportedly on failure to prove "scienter" and in which it is also reported that the jury stood 11 to 1 that the book was obscene. In *People v. McGilvery* (San Diego, Calif.), also a criminal trial, it is understood that the defendant was similarly acquitted because of failure to prove "scienter." Contrary results reached in appellate courts do not reflect jury "standards." They reflect the interpretation of what a majority of the members of those courts thought was the correct interpretation of what a majority of the members of this Court were thinking at the time the *Roth* decision was written. Such opinions are not, in the real sense, probative on the issue of "standards."

[52]*People v. The Bookcase Inc.*, 40 Misc. 2d 796, 244 N.Y.S. 2d 297, 300 (Crim. Ct. of City of New York 1963); *G. P. Putnam's Sons v. Calissi,* 86 N.J. Super. 82, 97, 205 A. 2d 913 (Dec. 7, 1964).

tists who place their ideas in the market place. We read *Curl's* case to say that government has such a right.

(e) *Roth-Standards Applied.*

The constitutional question is whether to the average person, applying contemporary community standards, the dominant theme of "Fanny Hill" taken as a whole appeals to prurient interest. The answer, unquestionably, is yes.

The test in each case is the effect of the books, considered as a whole, not upon any particular class, *but upon all those whom it is likely to reach.* The class of persons, as to whom the appellant's witnesses were testifying was a limited class—a group of literateurs. They cannot control this determination, where the book is to be offered for general sale.

This novel contains no saving factor that could overcome its obscenity. By no stretch of the imagination may it be classed as a serious work of fiction. It has no plot whatever except that which is sexual. See Appendix. The characters are introduced just long enough to accomplish their purpose, which is to show them as protagonists in a mass sex orgy.

There is no literary merit in the language. The sentence structure is archiac. The "metaphors" are nothing more than routine devices employed by professional pornographers to relieve the tedium of pornography. There is reason to believe that "engine" "machine" and the like may have had a prurient connotation 200 years ago, equal to our most salacious "modern" words. With no dictionaries to record obscenities, their "power" as word images is somewhat lessened.

The claim that "Fanny Hill" is a "moral" story is too shallow to deserve comment. Rather, it has a tendency to make a virtue of vice and a vice of virtue.

The predominant appeal of Fanny Hill is apparent. It is the "hidden look", the "voyeur" attraction, which dominates all pornography. In this regard we adopt, for sake of argument the testimony of Dr. Levin, who testified in the New Jersey trial of Fanny Hill:

"Q. Dr. Levin, have you read the book John Cleland's Memoirs of a Woman of Pleasure? A. I have.

Q. A copy of that is admitted in evidence by G. P. Putnam's Sons. A. Yes, I read that book.

Q. In your opinion, Doctor, what is the dominant subject matter of this book? A. Well, the dominant subject matter obviously is sex.

Q. How is sex treated in this book? Is it treated in a normal manner or healthy manner or wholesome manner? A. Well, that is a matter that can't be put into a single word. But I will say that the impression that I get from the book is that it treats sex from the standpoint of a voyeur. The book is full, besides giving detailed account of many acts of sexual intercourse, almost on every page, the book to a very great extent describes acts of sexual intercourse as they are seen by somebody.

Now the voyeur is a person who does not get his greatest kick out of sex unless he sees two other people having sexual intercourse in his presence. And the theme of voyeurism to my mind is the dominant theme of the book.

For example, the heroine of the book, Fanny Hill, early in her experience, before she has had sexual intercourse herself, she witnesses an act of sexual intercourse.

And then she is an inmate of a bordello, and there are four girls and four men, four girl inmates and four male guests who have a party one evening in the bordello, and each girl with her man has intercourse in the presence of all the other people. In other words there is a party that taks place in a bordello of four girls and four men. And the party consists of each couple having intercourse in the presence of the other three couples.

And then we read a few pages later that the madam of the bordello Mrs. Cole witnessed all this secretly from a peephole. It seems to me that this is emphasized to an abnormal degree throughout the book. So I would say without ever having had a chance to talk to the author of the book, I would say that he is either a voyeur or a man with strong voyeuristic tendencies.

Q. Doctor, I take this to be abnormal. A. Yes."

2. History Judgments of "Fanny Hill".

(a) *Reputation.*

In *Roth,* this Court recognized that it was "the universal judgment that obscenity should be restricted." It should be noted in this case, that it has been the universal judgment of history that "Fanny Hill" should be restrained.

This Court is now being asked to rule that the history of 215 years of suppression has been in error, and

that what has classically been regarded as a pornographic book has suddenly acquired the "social importance" which must make it available to all at every liquor store, drug store and candy store in every community in the nation. In some respects the case has the startling qualities of a demand that a neighborhood be zoned for a bawdy house.

Of interest on this score, are the observations of experts in this field, made at a time sufficiently removed from the present controversy to indicate fair reliability. The English writer, George Ryley Scott, speaking of "Fanny Hill" and John Cleland in his book "Into Whose Hands"[53] wrote the following observation in 1945, at page 145:

> "As regards the terminology employed by Cleland, there is an entire absence of profanity; there are none of the expletives and scatological terms which are so often featured in modern realistic fiction. Yet withal, the books stands out as perhaps the rankest pornography ever perpetuated by an English author having any claims to literary craftsmanship. The story is punctuated by scenes, sensually described, of the utmost salaciousness and indecency. In the first part there is the bedroom scene with the lesbian, Phoebe; there is the futile attempt at rape by Fanny's first client; there are the long erotic descriptions of her defloration by Charles, and of the seduction of her next lover's man-servant. In the second part, the various inmates of Mrs. Cole's brothel relate, with utter frankness, their life stories; there are twenty

[53]Into Whose Hands, George Ryley Scott, published by Gerald & Swan, Ltd. (1945).

pages graphically and without either delicacy or reticence depicting acts of intercourse; there is an *exposé* of Mrs. Cole's method of enabling her girls to simulate virginity; there is the notorious flagellation orgy, occupying half a dozen pages of text; there is the extraordinarily vivid description of overt homosexual vice; and finally there is the detailed account of the seduction of an idiot boy by one of the girls. One of these incidents alone would suffice to ensure the prosecution and destruction of any book published openly in England today. *The unexpurgated Fanny Hill is frankly aphrodisiacal in terminology and treatment and as such is a major contribution to pornography in its real and true sense; of this there is neither doubt nor question.*"(our emphasis).

Ernst and Schwartz, two outspoken American critics against censorship, in discussing the first case against "Fanny Hill" in the U.S. in 1821 have this to say about the book:[54]

"The volume was what is perhaps the best-selling pornographic novel of all times, . . ."

Addressing himself, to the subject of "Pornography" in the last chapter of his book "Suppressed Books,"[55] Alec Craig writes:

"The bulk of pornography is badly written, tedious, and boring; but by no means all. Men of the literary standing of Goethe and Maupassant have lent their pens to its production, and Alfred

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[54]Censorship, Morris L. Ernst and Alan V. Schwartz, published by The MacMillan Co., New York (1964) at page 15.

[55]Suppressed Books, Alec Craig, published by The World Publishing Co. 1963, at page 208.

de Musset wrote *Gamiani* to demonstrate that the French language was capable of being used to produce a book of the utmost license without employing a coarse word or inelegant expression. Indeed a great deal of pornography is quite readable taken in small doses, although the difficulties of the pornographer's task—the repeated presentation of sexual incidents which must rise to a crescendo of excitement—are all too apparent. The impossibility of avoiding monotony was once for all expressed, as we have seen, by John Cleland through the mouth of his Fanny Hill. Again, much pornography is badly printed and shabbily produced, but not all of it. Some pornographic books display great typographic and pictorial artistry on good paper in excellent binding. In fact, pornography is produced with a very wide range of literary skill and standard of book production."

(b) *Judicial Opinions.*

Appellant notes in its Jurisdictional Statement at page 3 that the basic question on appeal is whether the Massachusetts obscenity statute is unconstitutional because the highest court in that state has construed it to bar the importation, sale etc. of "Fanny Hill" in the State of Massachusetts. The appellant publisher's claim of unconstitutionality is laid to alleged rights arising out of the Fourteenth Amendment to the United States Constitution, adapted into the Federal Constitution in 1868.

It is interesting to note, as pointed out by the trial judge in his findings of facts, entered Sept. 3, 1964, that in 1821, forty seven years before the adoption of

the Fourteenth Amendment, under which appellant claims his rights in this action, the same book had been adjudicated obscene by the highest court of the same state in the case of *Commonwealth v. Holmes,* 17 Mass. 336, under the Common Law Rule which followed the *Rex v. Curl* (*supra*) precedent. Were this Court now to force the distribution of Fanny Hill upon the State of Massachusetts, against their express determination to the contrary, would be to attribute to the 14th Amendment a meaning not reasonably entertained by the states at the time they joined in the compact—certainly not the State of Massachusetts.

It would appear that Appellant is also arguing in the face of *Roth-Alberts,* for the majority opinion in that case, in support of its holding that obscenity was not protected by the First Amendment, takes note of the history of obscenity legislation in Massachusetts and in footnote 13 on page 483 cited the *Holmes* case (Fanny Hill) in support of its statement:

> "At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficient contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."

While the book was held to be not obscene in New York by a 4-3 vote in *Larkin v. G. P. Putnam's Sons,* 14 N.Y. 2d 399, 252 N.Y.S. 2d 71 (July 10, 1964), the majority opinion is based largely on a comparison with Tropic of Cancer and other material and makes some unwarranted assumptions in arriving at its decision. At page 75 the Court said:

> "Dealing as it is described as doing (Grove Press v. Gerstein 84 S. Ct. 1909), with 'numerous de-

> scriptions of abnormal sex acts and indecent conversations supposed to have taken place in a Florida brothel' we would regard it as being in a class with 'Fanny Hill' and perhaps as going somewhat farther in utilization of objectionable material. If that work could not be restrained by Florida because of the interdiction of the Constitution, New York would quite obviously be left without authority to restrain 'Fanny Hill' . . ."

Judge Bergan was making a comparison with a book he *obviously* never saw. "Pleasure is My Business" does not even remotely compare with "Fanny Hill" in pruriency. Similarly at page 74, the Court said:

> "When one looks carefully at the record since 1956 of what on constitutional grounds has been allowed to be printed and circulated, and what has been suppressed, 'Fanny Hill' seems to fall within the area of permissible publications. . . ."

Once again, the judge was making deductive[56] comparisons, and as to standards that were not before him.

The most that could be said by the Court in favor of the book was, at page 74:

> "It has a *slight* literary value and it affords *some* insight into the life and manners of mid-18th Century London. It is unlikely 'Fanny Hill' can have any adverse effect on the sophisticated values of our century. Some critics, writers, and the testimony as a whole showed reasonable difference of opinion as to its value . . ." (Our emphasis).

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[56]In our view the determination of obscenity is an inductive, rather than a deductive reasoning process.

In our view the majority gave very little, if any, thought to the reasoning behind the obscenity statute. (See Argument II ....) and certainly no consideration to the "balancing concept" of prior case law.

In contrast, the dissenting opinions of Desmond and Scileppi gave full consideration to the primary interest in order and morality. At page 76, Justice Desmond commended

> "The court's reasons for reversal are as unclear as its description of the book is inadequate. 'It is an erotic book,' blandly admits the opinion, 'concerned principally with sexual experiences, largely, normal, but some abnormal,' surely a euphemistic labeling of this journal of brothel life. It seems that since some critics testify that the book has merit, it cannot be suppressed particularly since the Supreme Court has reversed State court action banning some vaguely similar books and magazines. If such reasons justify the reversal of this injunction, no such injunction can ever stand and section 22-a of our Code of Criminal Procedure disappears. . . ."

and at page 77:

> "It is today's fashion to find literary values in any sexy writing and to ridicule as blue-nosed prying Puritans and enemies of art and literature all those who try to preserve a modicum of public decency in our society. And into the law itself there has come from nowhere a new constitutional theory which licenses the most unrelieved sexual filth either on the theory of 'prevailing community standards' (Larkin v. G. I. Distrs., 14 N.Y. 2d 869, 252 N.Y.S. 2d 81, 200 N.E.2d 768 [1964]) or on a

finding of literary merit or social values (Grove Press v. Gerstein, supra). The 'literary merit' ground has slowly evolved from an exception in favor of recognized literary classics into an exception for any writing which can command the praise of a recognized critic. As to 'community standards,' who measures and discovers them? When local courts with or without juries find that a book or movie is below standard, the appellate courts reject the findings because the court 'cannot avoid making an independent constitutional judgment on the facts of the case' (*Jacobellis v. Ohio,* 84 S.Ct. 1676 [1964])."

I refuse to believe that all this can continue to be the law. I predict that the wheel will turn and the pendulum swing back. Some time and somehow we will return to the historical meaning of "Freedom of the Press." On that awaited day the courts will find it possible in at least some extreme cases not only to announce but to apply their oft-repeated holding that obscenity is an exception to the First Amendment's protection. . . ."

Justice Scileppi's dissent was more vocal in expressing lack of attention paid to the Common Law principals behind *Curl's* case and the need for a balancing, at page 78:

"The majority opinion here, in my view, sounds the death knell of the long-honored standards of American decency which have remained an integral part of our national heritage. I cannot agree that our society, even in 1964, has become so depraved that it has come to accept the kind of trash represented by 'Fanny Hill' and similar books, the

publishers and purveyors of which are now given unbridled permission to advertise obscenity for sale with complete immunity. It is difficult to believe that our forebears, in adopting the Constitution and the amendments that followed, ever intended this result. Freedom of the press is not an absolute—it *must be balanced* against the State's inherent powers to enact legislation to protect its people. The First Amendment, guaranteeing freedom of speech and of the press, was never designed or intended to protect the purveyors of filth against the more important interests of our society as a whole. In balance, public decency and morality are more important than the deprivation resulting from the banning of noxious publications which seem to appeal to that small segment of our people whose baser instincts make reading of obscenity and pornography their favorite pastime." (Our emphasis)

We submit that the minority in the *Larkin* case applied the proper concepts and that the majority misconstrued what they were required to do under this Court's past decisions.

Trial Judge Pashman's opinion in *G. P. Putnam's & Sons v. Calissi,* 86 N.J. Super. 82 found himself in disagreement with the majority of the New York Court. Out of regard for the public's interest in order and decency, he stated at page 99:

"This is not the highway to a better constitutional world; it is rather the path to decay and decline. The Constitution should not be the sword of a shameful profiteer of filth. It must be the shield to protect our sense of moral decency. . . ."

and at page 98:

> "It is our duty to prevent the circulation of such pornographic literature. . . ."

He disagreed with Justice Bergan as to that justice's deductive reasoning and, in our view, correctly held that "Because no two books are alike, each court must evaluate the book before it on its actual contents and not by comparing it to some other book." He found the book had no "social value" was "patently offensive," "prurient" and "hard core pornography."

Judge Pashman made an interesting observation, in which amicus completely agree, at page 95:

> "Those who contend that Fanny Hill is a work of literary value because it affords insight into the life and manners of mid-18th Century London must necessarily have an overwhelming sense of humor. Resort to Fanny Hill to study or authenticate the mores of these times would be the nadir of research. . . ."

It were as though the critics were tailors, the book a suit of clothes and we were living, in the fairy land of Hans Christian Anderson.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX.

Fanny Hill (by John Cleland).

Memoirs of a Woman of Pleasure. (214 pages.)

G.P. Putnam & Sons,
c1963 LC 63-9656.

CHARACTERS:

Fanny Hill . . . . 15 year old orphan
Madam Brown . . . . madam of house of prostitution
Phoebe Ayres . . . . prostitute, lesbian
Polly Philips . . . 18 years old, prostitute
Charles . . . . Fanny's first love, 19 years old
Mr. H. . . . . 40 years old, Fanny becomes his mistress
Mrs. Cole . . . . madam of a genteel house of prostitution
Emily . . . . 18 years old, prostitute
Harriet . . . . 17 years old, prostitute
Louisa . . . . 18 years old, prostitute
Mr. Norbert . . . . 30 years old, Fanny becomes his mistress
Mr. Barville . . . . 23 years old, masochist
Good natured Dick . . . . feeble-minded youth
A man of sixty . . . . Fanny becomes his mistress when she is 18 years old.

Letter the First. (pp. to 104.)

The book is in the form of two letters, addressed to an unidentified "Madam." Fanny Hill, a fifteen year old orphan girl, becomes stranded on her arrival in London from the country. She hires herself out to a woman in the belief that she is to be a servant girl. This woman, a Mrs. Brown, takes her to what is actually a house of prostitution. On the first night, Fanny is "broken in" by another inhabitant of the house, one Phoebe Ayres,

who is about thirty-five years old. Pages 14 to 16 describe detailed lesbian sex acts performed by Phoebe on Fanny as she lies naked in bed. Phoebe caresses and fondles Fanny's body, forcing an introduction of her finger into the vagina, squeezing and compressing the lips until Fanny cried out in pain. Phoebe guides Fanny's hand into the cavity of her vagina, and moving rapidly to and fro, she reaches climax.

Mrs. Brown tries to sell Fanny to Mr. Crofts, an odious, ugly, ill smelling old man. He is very wealthy. Mrs. Brown leaves Fanny alone with him, and she is terrified of him. Pages 23 to 26 describe this monstrous old man trying to rape Fanny. She breaks loose from him long enough to ring the bell for Martha, the maid. Seeing Fanny lying on the floor, nose gushing blood, and clothes half torn off, Martha advises the old man to leave.

One day, as Fanny rests on a bed in Mrs. Brown's closet, she hears the madam enter the bedroom with a young man. Pages 30 to 33 describe intercourse twice between Mrs. Brown and the young man, while Fanny watches fascinated by the scene. The young man unbuttons his trousers and produces naked, stiff, and erect that wonderful machine that Fanny had never seen. He throws himself upon Mrs. Brown's naked fat thighs, and while they are in the heat of action, Fanny becomes so sexually aroused that she resorts to a masturbation technique she has learned from Phoebe, to relieve herself. After the intercourse is over, Fanny watches facinated as the experienced matron handles the young man's penis by chafing it with her hands, bringing it to swell to the size and erection it was the first time she saw it. They have intercourse in the same manner as before.

Fanny goes to her room with such pent up emotions that she has to relieve herself by masturbating again.

Fanny confides to Phoebe her major worry—that she is physically too small to admit a "gentleman's wonderful machine." To show Fanny how this can be accomplished, Phoebe leads her to a secret place, from which they watch a session of intercourse between a girl of the house, Polly Philips, 18 years old, and an Italian boy, about 22 years old. Pages 35 to 41 describe a wild sex orgy between them, and two acts of masturbation between Phoebe and Fanny. As Fanny and Phoebe watch from the closet, Polly, naked with her thighs spread open wide, accepts entrance from the nude young Italian. After having difficulty in entering her, he withdraws and wetting his fierce erect machine (penis) with spittle, re-enters, and with ease sheathed it now up to the hilt. He thrusts in regular cadence, and then in wild fury they reach climax together. Fanny becomes so wildly excited sexually at watching this scene, that Phoebe leans her against the closet door, pulling up her skirts, and relieves her by using her hand in masturbation, performing a lesbian sex act on her. They return to watch the young couple, as Polly performs an act of fellatio on the young man, and then he lies on his back and Polly straddles him. As they reach climax in this position, Fanny can bear to watch no more, as she is so emotionally overcome. Phoebe takes her to her room, where Fanny instantly throws herself down on the bed, submitting to a lesbian act by Phoebe, but feeling no sexual satisfaction from it herself.

Several days later, Fanny sees a young man, Charles, 19 years old, in the house, and she becomes infatuated

with him. He sneaks her out of the house, and they go to an Inn. Pages 47 to 57 describe their sex orgy. As this is the first sexual intercourse Fanny has had with a man, the narrative describes in minute detail the difficulty with which this is accomplished, because she is still a virgin. Charles tells Fanny later after she had fainted from the pain, on his drawing out, when emission was over with him, her thighs were covered with blood. (p. 49) As Fanny was unable to walk, Charles orders dinner sent to the room. After dinner they have intercourse again, but Fanny is still in too much pain to enjoy it. After successive engagements "broke and inur'd" her," she began to feel enjoyment of the act. (p. 51) The next morning, Fanny awakens early and engages herself with admiring Charles, who is still fast asleep. She admires his physical beauty, and especially his sex organs. Charles awakens, and guiding Fanny's hand to his sex organs, he has her fondle him until he can stand it no longer, and takes her in intercourse. (p. 55) They have lunch in bed, and then Charles dresses and goes to town.

Charles, with the help of a lawyer friend, makes an arrangement with Mrs. Brown that enables him to take Fanny from her house of prostitution. He returns to the Inn to tell the good news to Fanny. On the second night of repeated intercourse, the pain being pretty well over, for the first time Fanny learns the transports of perfect enjoyment. (p. 59) She becomes Charle's mistress, and he sets her up in lavish quarters. She is three months pregnant when Charles' horrified family tricks him into getting on board a ship that takes him away on a long voyage.

Fanny, heartbroken, miscarries. Mrs. Jones, a procuress, who takes care of the lodging house, sells Fanny to a Mr. H. He is about 40 years old, and the brother of an Earl. Page 71 describes Mr. H. having intercourse with Fanny, who is completely devoid of feeling for him. She begs him to leave her alone that night, but he leaves saying he will return in one hour. Mrs. Jones sends Fanny something to eat that sets her on fire sexually. She wanted even little wishing for any man. (p. 74) When Mr. H. returns, she eagerly accepts him, and looses all restraint in animalistic spirit. He keeps her in constant exercise till dawn of morning in repeated intercourse. The next morning, on her first awakening, she was obliged to endure one more trial of his manhood in intercourse. (p. 76)

Mr. H. sets Fanny up in lavish style as his mistress with her own maid, Hannah. Notwithstanding the fatigues of the proceding night, they have intercourse again. Mr. H. said it was "doing honours of her new apartment. (p. 77) Fanny has been with Mr. H. seven months when she sees him having sex relations with her maid. (p. 80) Fanny gets her revenge by seducing Will, a young servant, 19 years old. His sex organs rouse her to the greatest admiration and activity of many sessions of intercourse. Pages 84 to 99 describe this affair that lasted a month. Will's sex organs are enormous, and she both fears and desires this "oversiz'd machine." (p. 85) The details of their exertions here are minute, including his exploration of her private parts. (p. 90) Naked and free to his loosest wish, his hands convulsively squeezed, opened, pressed together the lips and sides of her vagina until he becomes so sexually aroused that he takes her in an animalistic intercourse. About

one month after their first intercourse, and during one of their sex sessions, Fanny is sitting in a chair with her naked thighs wide spread, and mounted over the arm of the chair as Will stands naked in front of her attempting intercourse. Mr. H. unexpectedly enters the room. He is so angry he pays Fanny off, and orders her out of the house, sending Will home to his father.

SECOND LETTER. (pp. 105 to 214)

Fanny is befriended by a Mrs. Cole, who keeps a genteel house of prostitution staffed by exquisite and lady-like whores, Emily, Harriet, and Louisa, all in their teens. They live in luxury. Fanny hears the life story of each, in which they express their satisfaction with this life of sexual pleasures. Emily tells her story first. Page 114 describes Emily, 15 years old, in bed with a 17 year old boy. She describes the loss of her virginity. She lay utterly passive until the piercing pain made her cry out, but as the pain subsided, she was soon reconciled to fresh trials. Harriet next, tells her story. Page 118 describes the loss of her virginity at the age of 16. She is raped by a young man she does not know, but she quickly forgives him, and willingly has intercourse with him a second time. Louisa tells her story next. She tells of losing her virginity at the age of 12, to a young college boy. Pages 124 and 125 describe her masturbating. Pages 126 and 127 describe two sessions of intercourse with the young man. She was split up, torn, bleeding, and mangled but was superiourly pleased, and after the second attack, sore as everything was, pain melted into pleasure.

Mrs. Cole arranges a party for the four girls and four men. This ends in a sex orgy, the men each having in-

tercourse with the girl of his choice, while the others watch including Mrs. Cole who always watches these affairs from a secret window in her closet. Louisa is the first one led to the couch. She spreads her naked thighs to the best advantage, and her young man throws himself instantly over her. All present could observe pleasure lighten in her eyes, as he introduced his "plenipotentiary instrument" into her. (p. 131) Harriet's turn is next, and she is led to the vacant couch by her young gallant. Pages 132 to 135 describe this orgy. Harriet sits on the end of the couch. She lies back with a pillow under her head, and Louisa and Emily each hold one of her legs, and support them until they are at their widest extension. The young man, after fondling and kissing her breasts, stands between Harriet's legs, and stooped his "mighty machine" to its lure. After he had nestled it in, the girls let him support Harriet's thighs. He urges the to-and-fro confriction until she is unable to contain herself, reaching climax in wild abandon. Emily is next, and pages 136 to 138 describe her orgy. The young man has Emily bend over the couch in a standing position, with her head on a pillow. He stands behind her, fondling her breasts. He drew out his "affair" whose extreme length was most surprising. He enters her from the rear in an act of sodomy. (p. 137) When Fanny's turn arrives, her young man strips her of her clothes, and poses her in all the variety of postures imaginable. He stands facing her, and she sees his penis is one of the "true-siz'd" instruments. He enters her in a standing position, then carries her to the couch, laying her down. Primed as they were by all the moving sights of the night, they continue in a long wild drawn out intercourse. (pp. 140 to 144) After the orgy, they all have a light supper, and then retire in

pairs. There ended the night of sex orgies for Fanny in one continued strain of pleasure. The next morning, they have breakfast in bed, and her young man dresses and leaves a purse full of guineas for her. That afternoon, Fanny goes to Harriet's room to rest, when her escort of the evening before arrives. Page 145 describes him in bed with Fanny performing an act of sodomy. Fanny's young man leaves for Ireland to get married before the month is up, ending the affair with Fanny who felt deep regret at the loss of him. She is 17 years old at this time.

Fanny is approached by a Mr. Norbert, about 30 years old, while shopping. She realizes he is a gentleman of wealth by his dress. With the help of Mrs. Cole, they make him believe Fanny is a virgin, knowing he will give more money for her favors. Pages 153 to 159 describe Mr. Norbert in bed with Fanny as she feigns great pain in intercourse, and after he falls asleep, she uses a sponge soaked in red dye to simulate blood. She squeezes the red liquid between her thighs, and when Mr. Norbert awakens, and sees what he thinks is blood, he is delighted. He tells Mrs. Cole with the utmost joy and rapture, of his triumphant certainty of her virtue. (p. 159) Fanny becomes Mr. Norbert's mistress. Page 161 describes Mr. Norbert stripping her naked on a carpet, kissing her in every part, and performing cunnilingus on her. He fondles and excites her sexually, but fails to satisfy her. On the way home one evening from one of these sessions with him, she meets a young sailor, and being so sexually aroused by Mr. Norbert, within a matter of minutes she goes to a tavern with him where they have intercourse. Page 162 describes this act. The sailor bends her over the table. He bares her

naked posteriour to his "blind and furious guide," performing an act of sodomy. When Fanny returns home, Mrs. Cole warns her of the dangers of her being "so open-legg'd and free," (p. 163), particularly the risks to her health. Fanny lived with Mr. Norbert nearly a quarter of a year, when he died quite suddenly, leaving her nothing. Although she has quite a bit of money, she remains in the whore house.

Mrs. Cole tells Fanny that a Mr. Barville, 23 years old, wants to be whipped by a girl, and he in turn wants to whip her. As he will pay a large sum of money, Fanny agrees to meet him. Pages 168 to 176 describe Fanny beating him with a rod made of two or three strong twigs of birch tied together. She beats him until he is covered with blood, and he reaches climax. (p. 170) He in turn, beats Fanny as she lies naked on a bench, face down. At the first sight of blood on her buttocks, he sucked the wounds, and eased a good deal of her pain. He makes her kneel, straddling wide, facing him, and then he directs the rod to her vagina so that the sharp ends of the twigs lighted there, then in a fit of wild passion he performs an act of cunnilingus on her. (p. 172) He finishes by beating her buttocks until she nearly faints from the pain. Dinner is sent in. After dinner, the orgy begins again. Mr. Barville has Fanny strike his penis with the rod, and as if it were a magic touch, he has an erection. He strips her stark naked, and because of their bloody and beaten condition, he handles her carefully by her waist, turning her upside down with her head on a pillow on the floor, and bringing her legs around his neck, her backside exposed to him as he stands up, he proceeds to have intercourse with her. (p. 175) After this "rare adventure" is

over, Fanny was not at any time re-enticed to renew this affair with Mr. Barville.

The next man Mrs. Cole procured for Fanny, was an elderly gentleman with a peculiar fetish. He would come constantly at her toilette hours, when she had her hair hanging loose, and he would keep her an hour or more just combing, fondling, and playing with her long hair. He bought a dozen pairs of white kid gloves at a time, and would divert himself with drawing the gloves over her fingers, and then biting off the finger ends. (p. 176)

Emily tells Fanny and Mrs. Cole of going to a costume ball with Louisa, who was dressed as a shepherdess and Emily went as the shepherd. Emily is accosted by a gentleman who takes her to his room thinking she is a young boy. Pages 178 to 179 describe Emily with her breeches stript down to her knees, leaning down against the bedside, while the man performs an act of sodomy. (p. 179)

Pages 181 to 182 describe Fanny watching two homosexuals, ages 19 and 17, at an Inn where they have taken a room next to hers. She stands on a chair peering through a hole in the wall. "The criminal scene they acted, she had the patience to see to the end." (p. 182)

Pages 184 to 190 describe Fanny and Louisa seducing good-natured Dick, a feeble-minded boy, unable to speak. He is dirty and unkept. Fanny removes his clothes and the girls are astonished at the size of his sex organs. "It (penis) stood accordingly stiff and straining, ready to burst with the blood and spirits that swelled it . . ." (p. 186) Louisa then, takes hold of the youth "by that master-tool of his" and leads him to the bed. As Fanny

watches, Dick proceeds to rape Louisa. The torn, split, wounded girl cried out to Fanny to rescue her, but all was in vain to stop Dick who was full of animal passion. Finally Louisa shares the riot of his wild rapture, their active loins quivered with the violence of their conflict.

Pages 192 to 195 describe a sex orgy with two men procured by Mrs. Cole, for Emily and Fanny. They all go swimming together in the nude. As Fanny enters the water with her young man, he takes his hands and goes over every part of her, neck, breast, belly, thighs, and all the et cetera, so dear to the imagination, under the pretext of washing and rubbing them. (p. 192) He attempts to have intercourse with Fanny, as they stand waist deep in the water, but they are interrupted by the sounds of Emily, who is sitting on the lap of her young man. In this position they engage in intercourse as Fanny watches with her escort. Fanny and her young man have intercourse on a bench, while Emily and her friend watch. (p. 195)

Mrs. Cole closes her house of prostitution, and Fanny rents a house in Marybone. She is now 18 years old. She meets an elderly gentleman of sixty, refined, intellectual, and wealthy. Fanny becomes his mistress, and lives with him until he dies eight months later, leaving her a small fortune. (p. 200)

On a trip to Lancashire, Fanny stops at an Inn, and unexpectedly meets Charles, her first love. Pages 207 to 212 describe a night of sex, and repeated intercourse with him. "At its mightiest point of stiffness, it felt to me something so subduing, so active, so solid and agreeable. . . I see, I feel the delicious velvet tip!—he enters me might and main—" (p. 209)

Charles and Fanny return to London. Charles makes Fanny his wife, who "thought herself too much honour'*d* in being but his mistress." (p. 213) They bestow a legal parentage on fine children by this happiest of matches. Fanny says, "the paths of Vice are sometimes strew'd with roses, but then they are forever infamous for many a thorn, for many a cankerworm; those of Virtue are strew'd with roses purely, and those eternally unfading ones." (p. 214)